

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 9, 2005

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 05MD-156

Maui

Partial Waiver of Land Use Restrictions Pursuant to Land
Patent Grant 15,991, Napili 4 and 5, Lahaina, Maui, TMKs (2)
4-3-01:06, 07 & 08

APPLICANT:

Maui Land & Pineapple Company, Inc.

PRIVATE LANDOWNER:

Maui Land & Pineapple Company, Inc., a Hawaii corporation, whose
address is Box 187, Kahului, Hawaii 96733-6687.

LEGAL REFERENCE:

Sections 171-63, Hawaii Revised Statutes, as amended.

LOCATION:

Portions of privately-owned lands situated at Napili 4 and 5,
Lahaina, Maui, identified by Tax Map Key: (2) 4-3-01:06, 07 & 08,
as shown on the attached map labeled Exhibit A.

AREA:

Combined area of the aforementioned parcels totals 187.7 acres,
more or less. However, only ±32.9 acres are included in this
request.

ZONING:

State Land Use District:	Urban/Rural
County of Maui CZO:	Agriculture

CURRENT USE:

Vacant and unencumbered.

TRUST LAND STATUS:

Whereas these lands were conveyed to the applicant as part of a land exchange pursuant to 171-50, HRS, these lands are now private lands, however with deed land use restrictions.

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: YES _____ NO XX

CONSIDERATION:

One-time payment to be determined by independent appraiser, pursuant to Chapter 171-63, HRS, and subject to review and approval by the Chairperson.

PURPOSE:

Waiver of land use restrictions as reserved by Land Patent Grant 15,991 allowing for the development of additional house-lots within privately-owned land.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

This action before the Board involves a release of deed restrictions encumbering former government lands, and does not require the use of State funds. Therefore, this action is exempt from the provisions of Chapter 343, HRS, relating to environmental impact statements. Inasmuch as Chapter 343 environmental requirements apply to Applicant's use of the lands, Applicant shall be responsible for compliance with Chapter 343, HRS, as amended.

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Process and obtain subdivision approval at Applicant's own cost;
- 2) Provide survey maps and descriptions for the privately-owned property according to State DAGS standards and at Applicant's own cost; and
- 3) Pay for the appraisal cost to determine the one-time payment pursuant to Chapter 171-63(a), HRS.

REMARKS:

On May 24, 2004, the State of Hawaii, through its Board of Land and Natural Resources (State), executed a land exchange with Maui Land & Pineapple Company, Inc. (MLP), pursuant to Section 171-50, Hawaii Revised Statutes (HRS). In this land exchange the State conveyed 223.000 acres of land to MLP, identified as Part 1 and Part 2 on Exhibit A.

At the time of the exchange, these lands were in the Agricultural State Land Use District and zoned Agricultural by the County of Maui. Nonetheless, an independent appraisal report valued the former State lands as Agricultural with urban potential, effective October 24, 2003. This appraisal report was reviewed and approved by the Department and was the basis of fair market value for the land exchange.

Subsequently, to appease concerns raised by the Legislature, these lands were conveyed subject to the use restrictions identified below. It is noted that these restrictions were not previously considered in the independent appraisal.

Ident.	TMK	Land Area	Restriction
Part 1	(2) 4-3-01:05	35.3 ac.	Open space, park and recreational style uses only.
Part 2	(2) 4-3-01:06, 07 & 08	187.7 ac.	Prohibiting residential dwellings.

Following the execution of the land exchange, MLP secured Land Use Commission approval for a State Land Use Urban designation. Moreover, MLP has submitted requests for Community Plan Amendment, Change in Zoning, and Project District Phase I approval to establish West Maui Project District 2 (Kapalua Mauka). Maui County, Department of Planning is currently processing these requests, which cover the aforementioned lands.

Pursuant to Section 171-63, HRS, MLP is now requesting the Board of Land and Natural Resources (BLNR) to waive the use restriction on approximately 32.9 acres of land within the area identified as Part 2. Whereas MLP believes a waiver of the use restriction encumbering the entire 187.7 acres, identified as Part 2, is not desirable, MLP has limited its request to only the ±32.9 acre area portion of Part 2, as depicted in Exhibit B, attached.

BLNR's favorable consideration of this request will provide additional development opportunities on the identified ±32.9 acres while maintaining the aforementioned restrictions on the remainder of Part 2. No changes are contemplated with respect to Part 1. The proposed development will be incorporated into MLP's proposed Kapalua Mauka project.

Subject to BLNR's approval, MLP shall at its own expense:

1. Obtain subdivision approval of the ±32.9 acres of land;
2. Provide survey maps and descriptions of the ±32.9 acres of land prepared to DAGS standards by a licensed Surveyor; and
3. Pay for an independent appraisal to determine the difference between fair market value of the land based

upon its restricted use and the fair market value with the restrictive condition waived, pursuant to Chapter 171-63, HRS.

Comments regarding this request were solicited from Office of Planning (DBEDT), Department of Hawaiian Home Lands (DHHL), Historic Preservation Division (SHPD), Maui District Land Office (MDLO), Maui County Department of Planning (Planning) and Office of Hawaiian Affairs (OHA). Comments received from DHHL, Planning and OHA are summarized below:

DHHL: "The appraisal of land values has already incorporated the removal of this restriction. Further, the Maui Land and Pineapple Company has secured Land Use Commission approval for an Urban designation."

Planning: "The County is currently processing a Community Plan Amendment, change in zoning and Project District Phase I approval to establish West Maui Project District 2 (Kapalua Mauka) which includes the land in question."

OHA: Although OHA acknowledges that MLP's request is following "correct procedures for such waivers", OHA raises concerns regarding the continuation of such practices. A copy of OHA's letter is attached as Exhibit C.

No comments or objections were received from DBEDT, SHPD or MDLO.

RECOMMENDATION: That the Board authorize the waiver of restrictions under the terms and conditions cited above which are by this reference incorporated herein and further subject to the following:

- A. Submission of a resolution notifying the Senate President and the Speaker of the House of Representatives of the requested amendment or waiver of restrictions and pertinent details, including but not limited to the appraisal values and proposed payment adjustment, pursuant to House Resolution No. 157, HD1, which was adopted by the House of Representatives of the Twenty-Second Legislature of the State of Hawaii, Regular Session of 2004;
- B. Review and approval by the Department of the Attorney General;
- C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

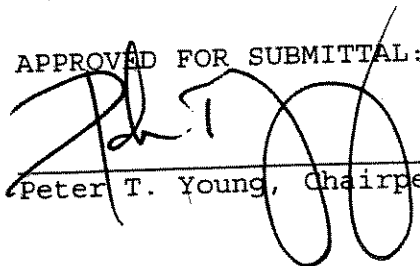
December 9, 2005

Respectfully Submitted,



vet
Gavin Chun
Project Development Specialist

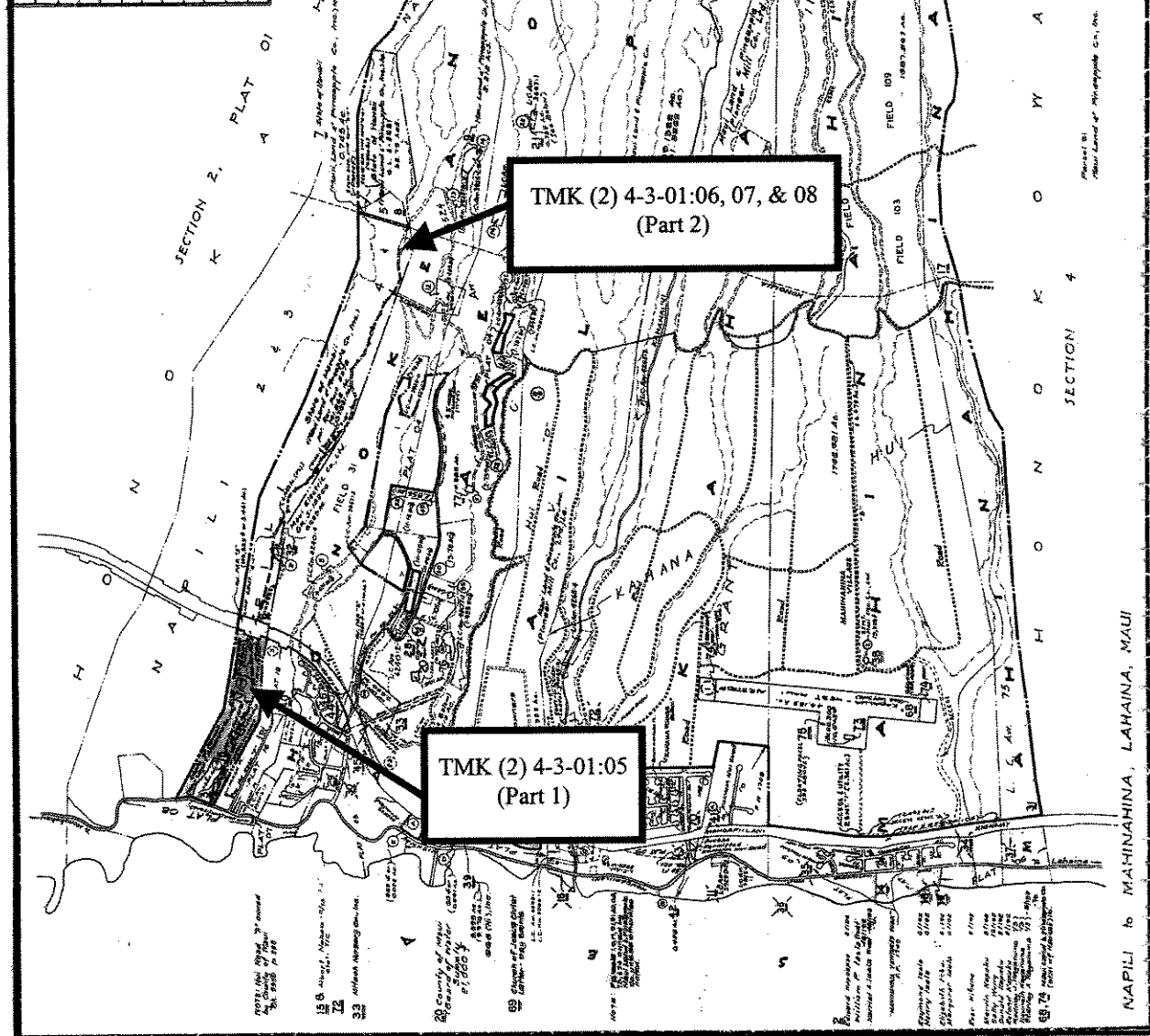
APPROVED FOR SUBMITTAL:



Peter T. Young, Chairperson

LC No.	AP	Owner	Res. Map	Area	LC No.	AP	Owner	Res. Map	Area
374-9	6	Maui Land & Pineapple Co., Inc.	4807-7	0.70 Ac.	380-6	4	Maui Land & Pineapple Co., Inc.	4807-7	0.76 Ac.
380-9	4		34C	1.09 Ac.	380-9	8		34C	0.32 Ac.
380-10	7		34C	0.89 Ac.	380-10	4		34C	0.80 Ac.
380-11	2		34C	1.00 Ac.	380-11	7		34C	0.71 Ac.
380-12	8		34C	0.88 Ac.	380-12	3		34C	2.37 Ac.
380-13	4		34C	1.78 Ac.	380-13	8		34C	0.88 Ac.
380-14	8		34C	1.88 Ac.	380-14	11		34C	0.48 Ac.
380-15	4		34C	0.97 Ac.	380-15	8		34C	4.08 Ac.
400-6	5		34C	0.89 Ac.					

UNIMPROVED LOTS OF UNIMPROVED LAND



Project Diagram: 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

REVISION MAPS BUREAU
TAX MAP
SECOND DIVISION
ZONE SEC. PLAT
4 3 01
CONTAINING PARCELS
SCALE: 1 in. = 1000 ft.



STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
711 KAPI'OLANI BOULEVARD, SUITE 500
HONOLULU, HAWAII 96813

July 18, 2005

Gavin Chun
Project Development Specialist
Department of Land and Natural Resources
Land Division
P.O. Box 621
Honolulu, HI 96809

HRD05/1942

2005 JUL 20 A 10:07

RECEIVED
LAND DIVISION

RE: Request for review and comment on request for a waiver of restrictions, Lahaina, Maui; TMKs: 4-3-001:005, 006, 007, and 008

Dear Gavin Chun,

The Office of Hawaiian Affairs (OHA) is in receipt of your June 30, 2005, request for comments on the above-referenced proposal, which would allow Maui Land & Pineapple Company to waive restrictions on a total of 32.9 acres of land that they own through a prior land exchange. OHA offers the following comments.

The relevant land exchange included the following conditions:

1. "limiting the use of Part 1 to open space, park and recreational-style uses; and"
2. "prohibiting residential dwellings on Part 2."

While the Land Patent Grant allowed that these restrictions could be waived or amended by the Board of Land and Natural Resources, and Maui Land & Pine is following the correct procedures for such waivers, OHA questions the methodology of these land transfers. The built-in ability of a developer to acquire land that is not zoned for development, but that, if the developer gets approval from the Land Use Commission and the pertinent county zoning office, can be relatively easily added to abutting lands that are currently zoned for development raises concerns.

EXHIBIT "C"

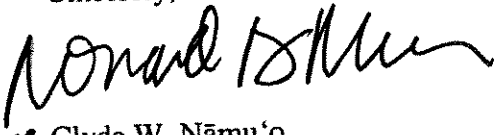
Gavin Chun
July 18, 2005
Page 2

Credit should be given to developers who can plan such land exchanges and corresponding land developments, and maneuver the intricate land use system. However, respect for cleverness aside, these loopholes in the zoning system should be closed. Land use management and planning should not be done piecemeal, and at a developer's specific behest, but should take long-term needs and sustainability into account and then be respected and followed, unless conforming provides undue hardship, is detrimental to prior vested interests, or harms public health, safety or welfare. That a developer conceptualized a development that went beyond the boundaries of existing zoning, used the foresight to acquire abutting lands, and then re-classified and is attempting to re-zone those lands to include and incorporate their preconceived plan does not meet any of the above requirements.

As a policy matter, OHA requests that the BLNR consider the implications of continuing to allow this methodology to occur. Perhaps the BLNR should wait to hear this particular waiver and appraisal request until after Maui County determines whether the zoning change will be approved. And, in the future, land exchange language should not provide such a large loophole to re-evaluate the protective status of such lands.

Thank you for the opportunity to comment. If you have further questions or concerns, please contact Heidi Guth at 594-1962 or e-mail her at heidig@oha.org.

Sincerely,



Clyde W. Nāmu'o
Administrator



R-282

STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED

JUN 01, 2004 08:01 AM

Doc No(s) 2004-109847

/s/ CARL T. WATANABE
REGISTRAR OF CONVEYANCES

CONVEYANCE TAX: \$1510.00

22 2/3 Z3

LAND COURT SYSTEM

REGULAR SYSTEM

Return by Mail () Pickup () To:

ATTN: CHARLENE E UNOKI
STATE OF HAWAII/DLNR
1151 PUNCHBOWL ST
RM 220
HONOLULU, HI 96813Tg. Accn: 200427377-4
DEPT. OF LAND AND NATURAL RESOURCES
LAND DIVISION

Total Number of Pages: 22

LOD No. 28,514

Tax Map Key Nos. (2)4-3-1:5, 6,
7, 8 and (1)9-4-166:1, 2 & 3EXCHANGE DEED AND AGREEMENT TO EXCHANGE

THIS INDENTURE, made and entered into this 25th day of May, 2004, by and between MAUI LAND & PINEAPPLE COMPANY, INC., a Hawaii corporation, whose address is Box 187, Kahului, Hawaii 96733-6687, hereinafter referred to as "MLP," and the STATE OF HAWAII, by its Board of Land and Natural Resources, whose address is 1151 Punchbowl Street, Honolulu, Hawaii 96813, hereinafter referred to as the "State";

WITNESSETH:

WHEREAS, MLP is the owner of those certain parcels of land situate at Waikele, Oahu, Hawaii, containing an area of 1.455 acres;

WHEREAS, the State is the owner of those certain parcels of land situate at Kapalua, Maui, Hawaii, containing an area of 223.000 acres;

WHEREAS, the State wishes to acquire MLP's lands for public purposes, to wit: for income-producing properties that the

State can lease out for the purposes of generating revenues for public trust purposes;

WHEREAS, the lands of MLP have an appraisal value of ONE MILLION SIX HUNDRED TEN THOUSAND AND NO/100 DOLLARS (\$1,610,000.00), and the lands of the State have an appraisal value of ONE MILLION FIVE HUNDRED TEN THOUSAND AND NO/100 DOLLARS (\$1,510,000.00); and

WHEREAS, MLP in order to perfect this exchange, waives the difference between appraised values of the lands to be exchanged.

NOW, THEREFORE, for and in consideration of the above and the covenants, agreements, and conditions as hereinafter set forth, the parties agree as follows:

1. MLP Conveyance.

MLP, for itself, its successors and assigns, and in consideration of the covenant of the State as hereinafter described and conveyance to MLP of State's lands described in Exhibits "C" and "E," and delineated on Exhibits "D" and "F," herein, does by these presents, grant, bargain, sell and convey unto the State, its successors and assigns, forever in fee simple, those certain parcels of land situate at Ahualii, Waikele, Ewa, Oahu, Hawaii, designated as "Exchange Maui Land & Pineapple Company, Inc. to State of Hawaii," containing a total area of 1.455 acres, all more particularly described in Exhibit "A" and delineated on Exhibit "B," both of which are attached hereto and made parts hereof; SUBJECT, HOWEVER, to the encumbrances listed on Exhibit "A."

TO HAVE AND TO HOLD the same, together with all improvements thereon and all tenements, rights, easements, privileges and appurtenances thereunto belonging, or appertaining or held and enjoyed therewith, unto the State, its successors and assigns, forever; subject to the encumbrances noted on Exhibit "A."

AND, said MLP, its successors and assigns, warrants that it is lawfully seized of these lands in fee simple, that it has good right to grant and convey the same as aforesaid; that the same are free and clear of all liens and encumbrances except as aforesaid; and that MLP and its successors and assigns shall WARRANT AND DEFEND the same unto the State, its successors

and assigns, against any and all lawful claims and demands of all persons whomsoever, forever.

AND, the State covenants that this purchase of real property has had prior approval as to form, exceptions, and reservations by the Attorney General pursuant to section 26-7 and section 107-10, Hawaii Revised Statutes.

AND, MLP warrants that if any lender or governmental agency shall ever require testing to ascertain whether there has been any release of hazardous materials by MLP on or adjacent to the Property, as determined by the State in its sole discretion, then MLP shall be responsible for the reasonable costs thereof. In addition, MLP shall execute affidavits, representations and the like from time to time at the State's request concerning MLP's best knowledge and belief regarding the presence of hazardous materials on the Property placed or released by MLP.

MLP agrees to indemnify, defend, and hold the State harmless, from any damages and claims resulting from the release of hazardous materials on or about the Property occurring while MLP was in possession of the Property, or elsewhere if caused by MLP or persons acting through or under MLP.

For the purpose of this deed "hazardous material" shall mean any pollutant, contaminant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil, as all of the above are defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, Chapter 128D, Hawaii Revised Statutes, or any other federal, state, or local law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced, or subsequently enacted.

2. State Agreement and Conveyance.

The State, for and in consideration of the foregoing conveyance to it, and pursuant to the provisions of Section 171-50, Hawaii Revised Statutes, as amended, does hereby covenant that it shall convey to MLP, its successors and assigns, by a separate instrument in the nature and form of a Land Patent Grant, SUBJECT, HOWEVER, to mineral (including geothermal) and water reservations, prehistoric and historic remains reservations, burial sites reservations, the rights of native tenants, easements and encumbrances of record, and a covenant against discrimination, and furthermore does hereby grant, bargain, sell and convey unto MLP, its successors and assigns,

forever in fee simple, those parcels of land situate at Napili 4 and 5, Lahaina (Kaanapali), Maui, Hawaii, consisting of:

"Exchange State of Hawaii to Maui Land and Pineapple Company, Inc., Part 1," containing an area of 35.3 acres, more or less, all more particularly described in Exhibit "C" and delineated on Exhibit "D," both of which are attached hereto and made parts hereof, said exhibits being a survey description prepared by the Survey Division, Department of Accounting and General Services, State of Hawaii, designated C.S.F. No. 23,769 and dated April 26, 2004, and delineated on survey map designated as H.S.S. Plat 1009-E, subject, however, to a restriction limiting the use of Part 1 to open space, park and recreational-style uses, and

"Exchange State of Hawaii to Maui Land and Pineapple Company, Inc., Part 2," containing an area of 187.7 acres, more or less, all more particularly described in Exhibit "E" and delineated on Exhibit "F," both of which are attached hereto and made parts hereof, said exhibits being a survey description prepared by the Survey Division, Department of Accounting and General Services, State of Hawaii, designated C.S.F. No. 23,770 and dated April 26, 2004, and delineated on survey map designated as H.S.S. Plat 1009-F, subject, however, to a restriction prohibiting residential dwellings on Part 2,

Provided, however, that the use restrictions on Part 1 and Part 2 may be amended or waived only upon prior approval of the Board of Land and Natural Resources and payment to the State of the difference between the fair market value of the land based upon its restrictive use and the fair market value of the land with this restrictive covenant amended or waived.

TO HAVE AND TO HOLD the same, together with all improvements thereon, and all tenements, rights, easements, privileges, and appurtenances thereunto belonging, or appertaining or held and enjoyed therewith, unto MLP, its successors and assigns forever, subject to the encumbrances noted herein.

SUBJECT TO rights of native tenants and regulatory rights and ownership rights (if any) of the State of Hawaii established pursuant to state law including Chapter 6E, Hawaii Revised Statutes, over prehistoric or historic remains found in, on, or under the land.

AND MLP for itself, its successors and assigns, covenants that the use and enjoyment of the lands received from

the State shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

PURSUANT TO SECTION 171-50(c), Hawaii Revised Statutes, as amended, this land exchange was approved by the Twenty-second Legislature during the 2004 legislative session (S.C.R. No. 9, S.D. 1, H.D. 1).

IN WITNESS WHEREOF, MLP, has caused these presents to be executed this 17th day of May, 2004, and the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and these presents to be executed this 25th day of May, 2004, both effective as of the day, month, and year first above written.

MAUI LAND & PINEAPPLE COMPANY,
INC., a Hawaii corporation

Approved by the Board of
Land and Natural Resources
at its meetings held on
July 27, 2001,
October 24, 2003, and
December 12, 2003.

By David C. Cole
Its Chairman, President & CEO

And By Paul J. Meyer
~~Robert M. McNatt~~ Paul J. Meyer
Its ~~Vice President/Land Planning & Development~~
Executive Vice President/Finance
MLP

APPROVED AS TO FORM:

James Z...
Deputy Attorney General
Dated: 5/11/04

STATE OF HAWAII

By Pat
Chairperson
Board of Land and
Natural Resources

STATE

PRELIM. APPR'D.
Department of the
Attorney General

STATE OF HAWAII

COUNTY OF MAUI

SS.

On this 17th day of May, 2004,
before me appeared David C. Cole and
~~Robert M. McNatt~~, to me personally known,
who, being by me duly sworn, did say that ~~they are the~~ ^{he is} Chairman, President & CEO and Vice President/Land Planning & Development
respectively, of MAUI LAND & PINEAPPLE COMPANY, INC., a Hawaii
corporation, and that said instrument was signed in behalf of
said corporation by authority of its Board of Directors, and the
said Chairman, President & CEO and Vice President/Land Planning & Development
acknowledged said instrument to be the free act and deed of said
corporation.

Debra A. Mahon
Notary Public, State of Hawaii

Debra A. Mahon

My commission expires: October 1, 2004

PRELIM. APPR'D.
Department of the
Attorney General

LOD 28,514 4883



HOUSE OF REPRESENTATIVES

STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813

RECEIVED

'04 MAY 17 10:44

May 13, 2004

DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

Mr. Peter T. Young
Chair
Board of Land & Natural Resources
P.O. Box 621
Honolulu, HI 96809

Dear Mr. Young:

I transmit herewith a copy of House Resolution No. 157, HD1, which was adopted by the House of Representatives of the Twenty-Second Legislature of the State of Hawaii, Regular Session of 2004.

Sincerely,

Patricia Mau-Shimizu
Chief Clerk
House of Representatives

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

2004 MAY 18 A 4 3

RECEIVED
LAND DIVISION

HOUSE RESOLUTION

SUBMITTING TO THE LEGISLATURE OF THE STATE OF HAWAII FOR REVIEW
OF ACTION TAKEN BY THE BOARD OF LAND AND NATURAL RESOURCES
ON LAND EXCHANGES.

WHEREAS, section 171-50, Hawaii Revised Statutes, provides that land exchanges of public land for private land are subject to disapproval by the Legislature by two-thirds vote of either the Senate or the House of Representatives or by majority vote of both in any regular or special session; and

WHEREAS, the State owns approximately 226 acres of public land in Lahaina, Maui, identified as Tax Map Keys: (2)4-3-01:05, 06, 07, and 08 ("Maui Lands"); and


WHEREAS, these parcels of public land are almost entirely surrounded by lands owned by Maui Land & Pineapple Company, Inc. (ML&P), have been in agricultural use for many years and are now rented for pineapple cultivation yielding \$6,060 in annual revenues; and

WHEREAS, the Land Study Bureau classifies these lands as having Type C (average) and Type D (below average) agricultural productivity ratings and the majority of these lands (177 acres) consist of gulch lands which are not suitable for cultivation; and

WHEREAS, ML&P is proposing a land exchange to acquire these 226 acres of public land for the purpose of combining portions of these lands with its adjacent privately-owned lands for its Kapalua Mauka project, a master-planned residential, commercial, and golf course development project; and

WHEREAS, most of the remaining acreage will remain in open space; and

I do hereby certify that the within document
is a full, true and correct copy of the original
on file in this office.


Chief Clerk
House of Representatives
State of Hawaii

WHEREAS, in exchange, ML&P would convey to the State three vacant lots in the Mill Town Center, an industrial park located in Waikele, Ewa, Oahu, identified as Tax Map Keys: (1)9-4-166:01, 02, and 03; and

WHEREAS, these lots are zoned for light industrial use, have county standard roadways and all utility infrastructure and will generate estimated annual rents of \$98,400 to \$131,200; and

WHEREAS, the parcels being conveyed to the State of Hawaii will provide the State with revenue-generating properties in exchange for remnant, poor quality agricultural land generating nominal rents; and

WHEREAS, proceeds from the leasing of the parcels to be acquired will be used for Public Land Trust purposes; and

WHEREAS, ML&P intends to utilize the makai parcel identified as Tax Map Key: (2)4-3-01:05 as open space, park- and recreational-type uses ("Makai Parcel");

WHEREAS, ML&P does not intend to construct residential dwellings on the mauka parcels identified as Tax Map Key: (2)4-3-01:06, 07, and 08 ("Mauka Parcels");

WHEREAS, ML&P and the Department of Land and Natural Resources (DLNR) have agreed that use restrictions to reflect these intended uses should be placed on the Maui Lands; and

WHEREAS, if ML&P desires to remove these use restrictions in the future, pursuant to section 171-63, HRS, the Board of Land and Natural Resources may amend or waive the conditions restricting the use of land contained in any deed or grant only upon the condition that the grantee pay to the State the difference between the fair market value of the land based upon its restricted use and the fair market value with the restrictive condition amended or waived; now, therefore,

BE IT RESOLVED by the House of Representatives of the Twenty-second Legislature of the State of Hawaii, Regular Session of 2004, that the following exchange, approved by the Board of Land and Natural Resources (Board), be reviewed and is hereby approved by this body:

EXCHANGE OF LAND BETWEEN STATE OF HAWAII AND MAUI LAND & PINEAPPLE COMPANY, INC.

Statute: Section 171-50, Hawaii Revised Statutes, as amended.

Purpose: Acquisition of income-producing land to generate revenues for Public Land Trust purposes.

Date of Board Approval: October 24, 2003.

I. MAUI LAND & PINEAPPLE COMPANY, INC. TO CONVEY TO THE STATE OF HAWAII

<u>Location</u>	<u>Tax Map Key</u>	<u>Area</u>	<u>Appraised Value</u>
Waikele	(1)9-4-166:01	0.573 acre	\$ 600,000
Waikele,	(1)9-4-166:02	0.378 acre	\$ 430,000
Waikele,	(1)9-4-166:03	<u>0.504</u> acre	\$ <u>580,000</u>
Oahu			
	Total	1.455 acre	\$1,610,000

II. THE STATE OF HAWAII TO CONVEY TO MAUI LAND & PINEAPPLE COMPANY, INC.

<u>Location</u>	<u>Tax Map Key</u>	<u>Area</u>	<u>Appraised Value</u>
Lahaina,	(2)4-3-01:05,		
Maui	06, 07, 08	226.545 acre	\$1,510,000

III. NAME OF DISINTERESTED APPRAISERS WHO APPRAISED THE PROPERTIES

Public Land

Medusky & Co., Inc., pursuant to appraisal report dated November 14, 2003.

Private Land

Medusky & Co., Inc., pursuant to appraisal reports dated October 31, 2003 and January 19, 2004.

BE IT FURTHER RESOLVED that such approval shall be subject to a restriction on the Makai Parcel limiting its use to open space, park- and recreational-type uses and a restriction on the Mauka Parcels prohibiting residential dwellings, which restrictions shall be incorporated into the exchange deed; and

BE IT FURTHER RESOLVED that if Maui Land & Pineapple Company, Inc. desires to remove the use restrictions on the Maui Lands, the Board of Land and Natural Resources may amend or waive the conditions restricting the use of the land only if Maui Land & Pineapple Company, Inc. pays to the State the difference between the fair market value of the land based upon its restricted use and the fair market value of the land with the restrictive conditions amended or waived; and

BE IT FURTHER RESOLVED that the Department of Land and Natural Resources is requested to notify in writing the Senate President and the Speaker of the House of Representatives of any request by Maui Land & Pineapple Company, Inc., to amend or waive the restrictions, and subsequently, the pertinent details, including but not limited to the appraisal values and proposed payment adjustment; and

BE IT FURTHER RESOLVED that certified copies of this Resolution be transmitted to the Chairperson of the Board of Land and Natural Resources and the Chairperson of the Board of Directors of Maui Land & Pineapple Company, Inc.

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 9, 2005

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.:05MD-230

MAUI

Grant of Term, Non-Exclusive Easement to Atlantis Submarines
Hawaii, LLC for Offshore Waters and Submerged Lands Purposes
and Construction Right-of-Entry, Lahaina, Maui, Tax Map Key:
(2) 4-6-33:seaward of Parcel 1

APPLICANT:

Atlantis Submarines Hawaii, LLC, a Limited Liability Company,
whose business and mailing address is 658 Front Street, Suite
#175, Lahaina, Hawaii 96761.

LEGAL REFERENCE:

Section 171-13 and 53(c), Hawaii Revised Statutes, as amended.

LOCATION:

Offshore waters and submerged lands at Lahaina, Maui, identified
by Tax Map Key: (2) 4-6-33:seaward of Parcel 1, as shown on the
attached map labeled Exhibit A.

AREA:

1 acre, more or less.

ZONING:

State Land Use District: Conservation
County of Maui CZO: None

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State
Constitution: YES ____ NO ____x

CURRENT USE STATUS:

Vacant and unencumbered.

December 9, 2005

CHARACTER OF USE:

Right, privilege and authority to utilize offshore waters and submerged lands at Lahaina, Maui for dive site for commercial submarine tours.

COMMENCEMENT DATE:

The first day of the month to be determined by the Chairperson.

EASEMENT TERM:

Forty (40) years.

ANNUAL RENT:

Annual rent to be determined by independent or staff appraisal establishing fair market rent, subject to review and approval by the Chairperson.

PERCENTAGE RENT:

1% percentage of gross revenues from Atlantis Submarines Hawaii Maui operations for the entire term. Submittal of percentage rent report with payment due thirty (30) days after the lease anniversary date.

RENTAL REOPENINGS:

At the 10th, 20th, and 30th years of the lease term, by staff or independent appraisal.

PERFORMANCE BOND:

Twice the annual rental amount.

MUTUAL TERMINATION:

Mutual termination for any reasons, as long as both parties agree.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

A finding of no significant impact (FONSI) for the environmental impact statement was published in The Environmental Notice on June 8, 2005.

The Land Board at its meeting of September 23, 2005, under agenda Item K-2, approved the Applicant's conservation district use application to install two (2) artificial reefs offshore of Puamana Beach park, Lahaina, Maui (CDUA #MA-3232).

December 9, 2005

DCCA VERIFICATION:

Place of business registration confirmed:	YES	<u>x</u>	NO	<u> </u>
Registered business name confirmed:	YES	<u>x</u>	NO	<u> </u>
Applicant in good standing confirmed:	YES	<u>x</u>	NO	<u> </u>

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Pay for an appraisal to determine initial annual rent and
- 2) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost.

BACKGROUND:

Atlantis currently operates a 48-passenger submarine in the Twin Peaks area; consisting of four (4) reefs (North, South, Keiki, Lost Vegas). Atlantis plans to finish the tour with the sunken Carthaginian. There are two (2) sites located approximately 3,100 feet offshore of Puamana Beach Park and approximately 1 ¼ mile south of Lahaina Harbor. Each site (Drop Zone A or B) is 21,780 square feet. The water depth is approximately 100 feet deep (16 fathoms). Atlantis is proposing to sink the Carthaginian at Drop Zone A. There are currently no plans to sink any artificial reef structures at Drop Zone B. However, future plans and available funding may enable Atlantis to further develop Drop Zones A and B with additional vessels and/or engineered artificial reef structures in the future. This would a) alleviate pressure on existing natural reef systems from overuse; b) promote reef and fish biomass increase for commercial and recreational users, divers; and c) provide educational opportunities to study biomass increase over time. Atlantis will not limit access to the area. Besides Atlantis, users would be non-commercial and commercial scuba tours, divers, and fishermen.

The Land Board at its meeting of September 23, 2005, under agenda Item K-2, approved the Applicant's conservation district use application to install two (2) artificial reefs offshore of Puamana Beach park, Lahaina, Maui (CDUA #MA-3232).

By letter dated October 24, 2005, Mr. Jim Walsh, General Manager for Atlantis Submarines Hawaii, LLC is requesting a term, non-exclusive easement for submerged artificial reef purposes. (Exhibit B)

REMARKS:

Atlantis had two (2) term easements with the Department: Non-Exclusive Easement S-5314 (Waikiki) for 5.814 acres and S-5363 (Kailua-Kona) for 2.099 acres. Land Board approval was obtained January 12, 1990 and January 26, 1990, respectively. Both were for a term of forty (40) years. First ten (10) years rent fixed, then the

December 9, 2005

next five (5) years the rent will be 1% of defined gross proceeds whichever is greater. Reopening on the day following the expiration of the 15th, 25th and 35th years.

Due to a rental reopening in 2005, staff discovered for Easement S-5363 (Kailua-Kona) Atlantis had not constructed the artificial reefs on the seafloor. Therefore, an easement document was not required. The Land Board at its meeting held on November 19, 2004 (Item D-27), approved and amended staffs recommendation for a mutual termination. Atlantis had argued that the termination date should be 1991 when they lost authority to place an artificial reef under CDUA #HA-5/7/87-2024 and they did not owe the Department any percentage rent since January 12, 2000. (Exhibit C) The Board made the effective date of the termination to be the Board meeting and that Atlantis shall be responsible for rent including any and all additional rent that is due pursuant to the 1% percentage rent requirement of the agreement that commenced on January 12, 2000.

Easement S-5314 (Waikiki) had a rental reopening on January 26, 2005. The Department determined the annual rent should be \$44,320 per annum or 2% of the defined gross receipts, whichever is greater. Atlantis rejected the Departments' rent offer. Arbitration followed.

On October 24, 2005, the Arbitrators determined the rent to be \$3,675 per annum or 1% of the gross receipts. (Exhibit D)

In 1990 submarine tours was a very new industry for the State of Hawaii. Substantial upstart expenses had to be incurred by Atlantis.

Therefore, it is understandable why Atlantis received favorable terms from the Department. Staff believes that this is no longer the case.

Atlantis requires a construction right-of-entry to sink the Carthaginian on December 14, 2005 or wait until May 16, 2006. The State does not want Atlantis to sink the Carthaginian during whale season and there is concern that the Carthaginian will not make it through another winter in Lahaina harbor.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

Agency or community comments were addressed by the Applicant in the conservation district use application (MA-3232) which was approved by the Land Board at its meeting of September 23, 2005, under agenda Item K-2.

RECOMMENDATION: That the Board:


1. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term non-exclusive easement to Atlantis Submarines Hawaii, LLC covering the subject area for offshore waters and submerged lands purposes under the terms and conditions cited above,

December 9, 2005

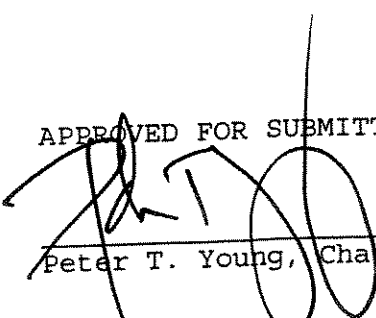
which are by this reference incorporated herein and further subject to the following:

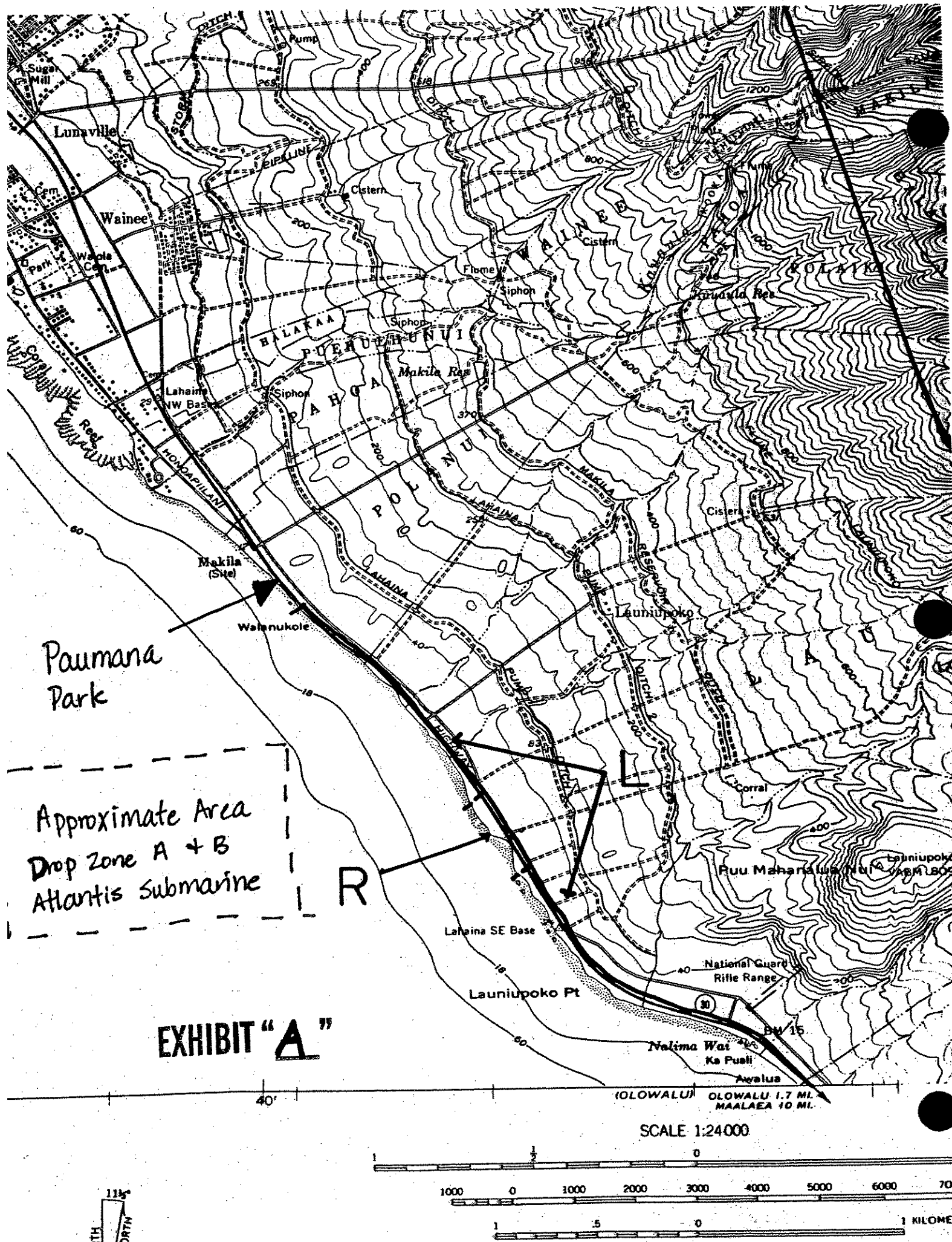
- A. The standard terms and conditions of the most current term easement document form, as may be amended from time to time;
 - B. Review and approval by the Department of the Attorney General; and
 - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
 - D. Compliance with terms and conditions approved by the Land Board at its meeting of September 23, 2005, under agenda Item K-2 for Cдуа #MA-3232.
2. Obtain prior approval of the Governor and the prior authorization of the legislature by concurrent resolution.
 3. Authorize the issuance of a construction right-of-entry to Atlantis Submarines Hawaii, LLC and their contractors covering the subject area under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - A. The standard terms and conditions of the most current right-of-entry permit form, as may be amended from time to time; and
 - B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,


Charlene E. Unoki
Assistant Administrator

APPROVED FOR SUBMITTAL:


Peter T. Young, Chairperson





RECEIVED
MAUI DISTRICT
LAND DIVISION

2005 OCT 31 PM 1:38

October 24, 2005

Mr. Daniel Ornellas
Department of Land and Natural Resources Land Division
54 High Street, Rm #101
Wailuku, HI. 96793

Re: Ref. No.: 05MD-230

Subject: Request to Term, Non-Exclusive Easement for Atlantis Submarines Hawaii, LLC for Submerged Artificial Reef Purposes; Lahaina, Maui, Fronting Tax Key: (2) 4-6-033; Parcel 001

Dear Mr. Ornellas,

Thank you for your letter dated October 11, 2005. As I understand it, you are in the process of reviewing my application. I have a request that I would like for you to consider in regards to my long term, non-exclusive easement application. Atlantis is seeking a long term non-exclusive easement; whereby, we would be granted the same 10 year exemption as was done on Atlantis' other two locations in Kona, and Waikiki. After that, we would follow the agreements set forth in the recent Atlantis Waikiki mediation resolution.

There is a sense of urgency on this project, as the vessel that we are seeking to sink will not make it through another winter in Lahaina harbor. My deadline to sink her this year is December 14, 2005. The state does not want me to sink her during the whale season, so if I miss this opportunity, I will have to wait until May 16, 2006.

I would be happy to meet with you and Mr. Molmen if needed to help expedite this process.

Thank you in advance for your help in resolving this matter as quickly as possible.

Best regards,

Jim Walsh
Atlantis Adventures ~ Maui
General Manager
658 Front Street, Suite # 175
Lahaina, HI. 96761
Tel (808) 667-6604
Fax (808) 661-1210
www.atlantisadventures.com

EXHIBIT "B"

GL5363 D-27

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

November 19, 2004

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Doc No.: GL 5363

Island of Hawaii

Mutual Termination of Non-Exclusive, Term Easement Bearing GL No. S-5363
to Atlantis Submarines Hawaii, L.P., Offshore Waters, Kailua-Kona, North Kona,
Hawaii; Tax Map Key: 3rd/ 7-5: Offshore Waters

APPLICANT:

Atlantis Submarines Hawaii, L.P.

LEGAL REFERENCE:

Section 171-13, Hawaii Revised Statutes, as amended.

LOCATION:

Offshore waters situated at Kailua-Kona, North Kona, Hawaii, as shown on the attached
map labeled Exhibit A.

AREA:

2.099 acres, more or less.

EASEMENT PURPOSE:

Right, privilege, and authority to utilize offshore waters and submerged lands at Kailua-
Kona, Hawaii, for dive site for commercial submarine tours.

EASEMENT TERM:

The term of the easement is for forty (40) years, commencing on January 12, 1990 and
ending January 11, 2030.

as amended
APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
November 19, 2004

ITEM D-27

EXHIBIT "C" *mc*

ANNUAL RENT:

For the first ten (10) years, a minimum annual guaranty of Six Hundred Sixty (\$660.00)
For the next five (5) years, the rent will be one (1%) per cent of the defined gross
proceeds or the said minimum annual guaranty amount, whichever is greater.

RENTAL REOPENINGS:

The minimum annual guaranty and the percentage rental shall be reopened and
redetermined as of the 15th, 25th and 35th years of the term.

A reopening appraisal was recently completed for the period commencing January 12,
2005. The independent appraiser's conclusion was \$6,400 per year and or 2% of gross
proceeds whichever is greater.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

Applicant received a CDUA approval (CDUA-HA-2024), approved by the Board at its
meeting of January 18, 1987, under Agenda Item H-12 and as amended under Agenda
Item H-6 at its meeting of January 13, 1989.

REMARKS:

At its meeting of December 18, 1987, the Board approved CDUA No. HA-5/7/87-2024,
that would allow for the location of a 52 foot steel ketch named the "C'est La Vie" within
the proposed dive site as an attraction for the submarine tour as well as an artificial reef
for potential fish habitat. At its meeting of January 13, 1989, the Board approved an
amendment to it's prior action extending the dates requiring that construction be initiated
by November 26, 1989 and be completed by November 26, 1992.

At its meeting of January 12, 1990, the Board approved a term, non-exclusive easement
to Atlantis Submarine Hawaii, L.P. for a dive site for submarine tours. Non-Exclusive
Easement bearing GL No. S-5363 was issued on May 12, 1997 for a term of 40 years
commencing on January 12, 1990 and ending on January 11, 2030. The easement was
issued 5 years after the CDUA deadline for completion of construction. However, while
submarine tours have been occurring within the easement area, no construction of the
artificial reef ever took place. The Grantee did not alert staff to the non-construction nor
did staff question it while processing the easement document.

In informal discussions with the AG's Office, staff learned that a non-exclusive easement
for submerged lands is required only when structures are placed on the seafloor. If
submarine companies merely run their tours without installing improvements, no
easement is needed.

EXHIBIT "C"

As a result, we have a lease on a term easement that was executed in 1997, commenced in 1990, requires that the Grantee complete construction by 1992, and includes an abandonment clause that reads:

“These easement rights shall cease and terminate, and the easement area shall revert to the Grantor, in the event of non-use or abandonment by the Grantee of the easement area, or any portion thereof, for a consecutive period of one (1) year.”.

Due to the upcoming rental reopening in 2005, the staff appraiser contracted an independent appraiser that concluded a new fair market rental of \$6,400 per year and a new percentage rent of 2% per year, whichever is greater, the new rent to begin January 12, 2005. Due to the reopening appraisal, staff discovered that the percentage rent should have been imposed as of January 12, 2000, but no gross receipt reports were ever filed by the Grantee and due to the lack of ability to track such changes in the lease prior to SLIMS, no defaults were ever issued. The Grantee did submit a record of gross proceeds dating back to 2000, and if the percentage rent were to be imposed, the additional rent owed dating back to 2000 and up until June 30, 2004, would amount to over \$47,000+.

Upon inquiry with the Grantee, the Grantee indicated that no artificial reef was ever placed within the easement area and they were only maintaining the easement as a “placeholder” to somehow retain the right to the easement for the minimum rent of \$660 per year. Although the easement was maintained, the Grantee no longer had any authority to place an artificial reef on the site due to the expiration of the CDUA deadline back in 1992. If not for the initial intent to placing an artificial reef on the ocean floor, Atlantis would not need an easement for the purpose of simply traversing the ocean waters as they do today.

Given the percentage rent amount that should have been imposed as of January 12, 2000 and the new rental reopening determination of \$6,400 per year or 2% of gross proceeds, the Grantee has now taken the position that the easement was tied to the sinking of an artificial reef, and should have been declared abandoned as January 12, 2001. The Grantee submitted two letters dated August 31, 2004 and September 30, 2004 (copies attached as Exhibits B & C), expressing their position that the easement should be tied to their placement of an artificial reef and they should not be obligated to pay the percentage rent.

In summarizing the situation, staff would offer the following:

- A mutual termination of the easement would appear to be in order as the authority under the CDUA to place an artificial reef on the site expired in 1992. Should the Grantee wish to pursue the placement of an artificial reef in the future, it would

require another CDUA permit and a continuation of the easement would appear to presume approval.

- As noted earlier, the lease was executed in 1997, commenced retroactively from 1990, contained a condition that the Grantee comply with the CDUA permit conditions which required that the reef be placed by 1992, and contained an abandonment clause that indicates that all easement rights shall cease and terminate and the easement area shall revert to the grantor without any action in event of non-use for a consecutive period of one year. The Grantee's most recent position is that the easement ceased in 1991, a year after the commencement of the easement due to the non-use/abandonment clause.

While the Grantee lost its authority to place an artificial reef under the CDUP due to the lapsing of the permit, staff believes the non-use and abandonment clause within the easement document does not apply in this case. Black's Law Dictionary states that, "'abandonment' includes both the intention to abandon and the external act by which the intention is carried into effect. In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry, for there can be no abandonment without the intention to abandon." The Grantee has been operating commercial submarine tours in the area since the commencement of the easement, has been paying rent to date and was providing liability insurance. If the Grantee had intended to abandon the easement back in 1991, then there should have been some evidence of such intention. Only when the issue of percentage rents was raised in 2004 did the Grantee express its desire to abandon the easement back to 1991.

- Staff would point out that the Board does not have the authority under the law to waive any rent. The fair market rental for the easement rights were determined by independent appraisal.
- Notwithstanding the foregoing, staff would recommend that the Grantee be required to reimburse the State for its cost associated with the independent reopening appraisal. If not for the Grantee's decision to maintain the easement as a "placeholder", the State would not have incurred the expense of such a reopening appraisal. According to the staff appraiser, the appraisal was bid out as a package with other appraisals and the prorated cost is approximately \$1,633. Staff is recommending that the Grantee be required to reimburse the State an amount of \$1,800 for the administrative time and independent appraisal costs.

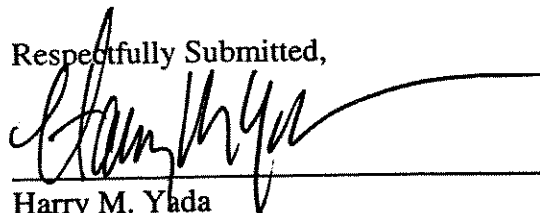
RECOMMENDATION: That the Board:

1. Authorize a mutual termination or cancellation of the Lease of Non-Exclusive Easement S-5363, subject to the following terms and conditions:

EXHIBIT "C"

- a. The appropriate document form for the mutual termination or cancellation shall be subject to the determination and review of the Department of the Attorney General;
- b. The effective date of the termination or cancellation shall be the date of the Board meeting and Atlantis Submarines Hawaii, L.P. shall be responsible for rent including any and all additional rent that is due pursuant to the 1% percentage rent requirement of the agreement that commenced on January 12, 2000. The actual amount due the State shall be determined upon the receipt of updated gross proceeds report up to and including the date of the Board meeting;
- c. In consideration of the State's agreement to terminate or cancel the Lease of Non-Exclusive Easement, Atlantis Submarines Hawaii, L.P. shall pay the State an additional amount of \$1,800 that shall represent a reimbursement of costs associated with the independent appraisal that was done for the re-opening of rental scheduled to take effect on January 12, 2005;
- d. Review and approval by the Department of the Attorney General; and
- e. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,


Harry M. Yada
District Land Agent

APPROVED FOR SUBMITTAL:

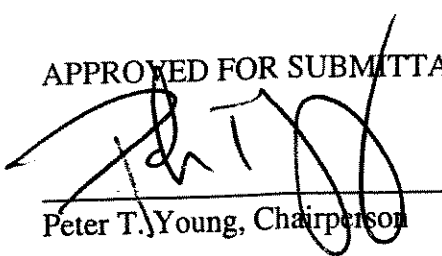

Peter T. Young, Chairperson

EXHIBIT "C"

Approved as amended. The Board amended the Recommendation Section by amending paragraph 1.b. to read as follows:

- "1.b. The effective date of the termination or cancellation shall be the date of the Board meeting and Atlantis Submarines Hawaii, L.P. shall be responsible for rent including any and all additional rent that is due pursuant to the 1% percentage rent requirement of the agreement that commenced on January 12, 2000. The actual amount due the State shall be determined upon the receipt of updated gross proceeds report up to and including the date of the Board meeting. Collection shall be referred to the Department of the Attorney General;"

REDUCED/NOT TO
SCALE

TRACED	5-STRUCT
7	5
7	5

ADVANCE SHEET
SUBJECT TO CHANGE
CONTAINING PLATS
P-24-10-1000



EXHIBIT "C"

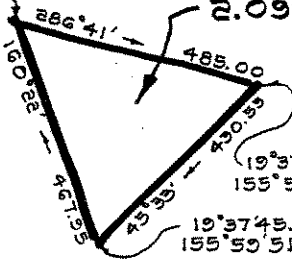
EXHIBIT A

Long No. 1002
Source: KNC & GVC - March, 1936

REDUCED/NO. TO
SCALE

19°37'49.57" N. Lat.
155°59'52.90" W. Long.

2.099 ACRES



INSET
Scale: 1 inch = 300 feet

TRUE NORTH
Scale: 1 inch = 1000 feet

KAILUA BAY

NON-EXCLUSIVE EASEMENT
FOR SUBMARINE TOURS
DIVE SITE
2.099 ACRES

SEE INSET



NON-EXCLUSIVE EASEMENT
FOR SUBMARINE TOURS DIVE SITE
SITUATED IN THE OFFSHORE WATERS OF KAILUA-KONA
ISLAND OF HAWAII, HAWAII
Scale: 1 inch = 1000 feet

H-157 (93)

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

EXHIBIT "B"

R.S.N. May 27, 1993

EXHIBIT "C"

EXHIBIT A

Atlantis.

ADVENTURES

August 31, 2004

2004 SEP -1 P 1:55

Mr. Harry Yada
District Land Agent
State of Hawaii
Department of Land and Natural Resources
Land Division
P.O. Box 936
Hilo, Hawaii 96721-0936

RECEIVED
LAND DIVISION
HILO, HAWAII

RE: Lease of Non-Exclusive Easement S-5363 dated May 12, 1997

Dear Mr. Yada,

In response to your letter dated July 23, 2004, requesting a record of the monthly gross receipts derived by Atlantis Submarines Hawaii, LLC, formerly Atlantis Submarines Hawaii, L.P. ("Atlantis"), from our Kailua-Kona submarine tour operation, for the period January 1, 2000 to present, and per our phone conversation today, please find enclosed the requested monthly gross receipts for this period. We would like to discuss further the applicability of the percentage fee under the Lease, since Atlantis has never "occupied" the easement area by the creation of an artificial reef at the site.

Atlantis Submarines Hawaii, L.P. opened its first dive site in Hawaii in Kona in 1988, and in conjunction with that operation, we requested the referenced Lease for a non-exclusive easement to allow us to place an artificial reef in the easement area in the future. There are, and have been other commercial operators who utilize the ocean resources for tourism activities; however, we were probably the first commercial operation requesting to use the ocean floor for this purpose, and consequently this unusual request came under the jurisdiction of your office.

Since the commencement of this agreement on January 12, 1990, Atlantis has agreed and paid the minimum annual guaranty of \$660 per year as a "placeholder" should we decide to utilize the easement area for an artificial reef.

It is our position that since we have not proceeded under the Lease to use the dive site by placing an artificial reef, we believe the dive site easement has no greater value to our operation than to a similar commercial operator who views the ocean bottom floor, like a commercial scuba operator, glass bottom boat operator (Nautilus used to operate out of Kailua-Kona pier); or a parasailing operation, or dinner cruise operator who uses the ocean surface, and who are not subject to a similar percentage rent agreement. We feel that the use envisioned under the Lease was based on the placement of an artificial reef, as is the case in Waikiki where we operate a submarine tour under a similar easement agreement, and have placed an artificial reef for which we are paying the percentage rent.

EXHIBIT "C"

EXHIBIT B

Further in support of both parties' intention of the agreement, our submarine operation in Maui, similar to other commercial ocean users, and without an artificial reef, is not subject to any fees associated with a "non-exclusive easement agreement".

Although Atlantis has never improved the dive site by placing an artificial reef as envisioned by the Lease, the State has not taken any action to take back the easement area, and we have continued to pay the annual minimum guaranty. We understand by not sinking an artificial reef, this could be considered a "non-use or abandonment by Atlantis of the easement area" as discussed in Paragraph 9 of the agreement, and if DLNR intends to revoke our future easement rights, we would wish to be so informed, so that we can respond accordingly. However, we recognize the value of maintaining our future "easement rights" to sink an artificial reef in the easement area in Kailua-Kona, and wish to continue to pay the annual minimum guaranty of \$660.

If you have any questions, please contact me at 808-973-9837. I look forward to your response, and as I mentioned on the phone, it is my hope that we can resolve these issues without further involving legal counsel, and incurring additional expenditures.

Sincerely,



John Kojima
Chief Financial Officer

CC: Ronald Williams, President, CEO
Michael Stanton, General Manager, Atlantis Kona

EXHIBIT "C"

Atlantis.

ADVENTURES

September 30, 2004

2004 OCT -1 P 1:20
RECEIVED
LAND DIVISION
HILO, HAWAII

Ms. Dierdre S. Mamiya
Land Division Administrator
State of Hawaii
Department of Land and Natural Resources, Land Division
Post Office Box 621
Honolulu, Hawaii 96809

Dear Ms. Mamiya,

Please find enclosed our response to the Reopening Offer Letter for the Ground Rent for General Lease No. S-5363, Kailua-Kona, Hawaii. I have been in various discussions and conversations with Mr. Harry Yada of your Hilo Office and Mr. Cyrus Chen here in Honolulu as to why we cannot accept the new lease rent proposal, and our position that we believe the lease is tied to the sinking of an artificial reef, which does not exist.

Accordingly, as per Par. 9 of the lease agreement, "the easement rights shall cease and terminate, and the easement area shall revert to the Grantor without any action on the part of the Grantor, in the event of non-use or abandonment by the Grantee of the easement area, or any portion thereof, for a consecutive period of one (1) year". Therefore, for purposes of discussion, this lease could be argued as being effectively terminated on January 12, 1991, and that past rents paid by Atlantis from 1991 to present deemed to be not appropriate. Additionally, I understand from speaking with Mr. Yada that under the CDUA-HA-2024 permit, we needed to exercise our rights to sink an artificial reef within a restricted time period, which has lapsed, and if we desired to sink an artificial reef we would have to go through the permitting process again, which is unlikely.

If the easement rights have not already been automatically terminated or ceased as per Par. 9, then this letter will serve as our written notification that we wish to terminate the lease agreement, retroactively back to January 12, 1991, as there is no intent to renew the CDUA permit, nor sink an artificial reef in Kailua-Kona.

Please advise.

Sincerely,


John A. Kojima
Chief Financial Officer

Cc: Ronald Williams, President, CEO
Harry Yada, District Land Agent, Hilo

EXHIBIT "C" EXHIBIT C

October 24, 2005

Mr. Steve Molmen
Mr. Cyrus Chen
State of Hawaii
Department of Land and Natural Resources
Land Division
P.O. Box 621
Honolulu, Hawaii 96809-0621

C. Michael Heihre, Esq.
Cades Schutte
Attorney for Atlantis Submarines Hawaii, L.P.
Cades Schutte Building, Suite 1200
1000 Bishop Street
Honolulu, Hawaii 96813

Re: Determination of Fair Market Rental Pursuant to Grant of Non-Exclusive Easement S-5314

Gentlemen:

The State of Hawaii, by its Board of Land and Natural Resources, is the Grantor (the "Grantor"), and Atlantis Submarines Hawaii, L.P. is the Grantee (the "Grantee") under the Indenture, dated March 14, 1994 ("Grant of Non-Exclusive Easement S-5314"). Grant of Non-Exclusive Easement S-5314 provides for the reopening and redetermination of the minimum annual guaranty and the percentage rental for the ten year period commencing January 26, 2005.

In accordance with Grant of Non-Exclusive Easement S-5314 and the provisions in Hawaii Revised Statutes, Chapter 658A, Alan J. Conboy, MAI, SRA, the appraiser appointed by the Grantor, Jan R. Medusky, MAI, CRE, the appraiser appointed by the Grantee, and Sanford D. Goto, MAI, the third appraiser appointed by Messrs. Conboy and Medusky, have been duly appointed to perform the function of a board of arbitration in determining the fair market rental for the ten year period commencing January 26, 2005.

The Arbitrators have reviewed Grant of Non-Exclusive Easement S-5314, analyzed relevant market and other data, prepared independent appraisal reports, conducted a hearing, considered all documents and other written and oral communications submitted by or on behalf of the Grantor and Grantee, and have discussed and shared findings and conclusions.

In accordance with Grant of Non-Exclusive Easement S-5314 and applicable laws of the State of Hawaii, the majority of the Arbitrators have determined, one member dissenting:

The fair market rental for the subject non-exclusive and term easement rights (Grant of Non-Exclusive Easement S-5314) for the ten (10) year period commencing January 26, 2005, is:

- * Minimum Annual Guaranty Rental: \$3,675.00 per annum
- * Percentage Rental: One Percent (1.0%) of Gross Receipts

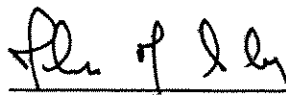
Mr. Steve Molmen
Mr. Cyrus Chen
C. Michael Heihre, Esq.
October 24, 2005
Page 2

IN WITNESS WHEREOF, the undersigned Arbitrators have executed these presents as of the 24th day of October, 2005.

Concurs

Does Not Concur


Jan R. Medusky, MAI, CRE


Alan J. Conboy, MAI, SRA


Sanford D. Goto, MAI

STATE OF HAWAII

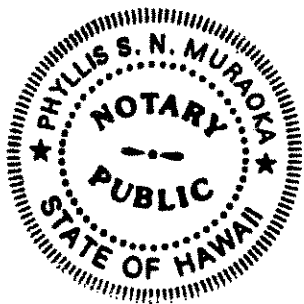
)

) SS.

CITY AND COUNTY OF HONOLULU

)

On this 24 th day of October, 2005, before me personally appeared Alan J. Conboy, Jan R. Medusky, and Sanford D. Goto, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.



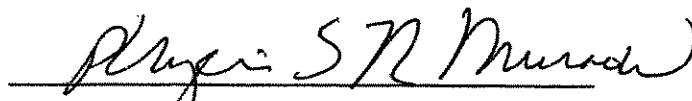

Name: Phyllis S. N. Muraoka
Notary Public, State of Hawaii
My commission expires: 6.6.06

EXHIBIT "D"

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 9, 2005

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 05OD-188

Oahu

Withdrawal from Governor's Executive Order No. 571 to the Department of Public Safety and Reset Aside to Department of Transportation, Highways Division for Highway Purposes, Kalihi-Kai, Honolulu, Oahu, Tax Map Key: (1) 1-2-013:Portion of 02.

CONTROLLING AGENCY:

Department of Public Safety

APPLICANT:

Department of Transportation, Highways Division

LEGAL REFERENCE:

Section 171-11, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands situated at Kalihi-Kai, Honolulu, Oahu, TMK: (1) 1-2-013:Portion of 02, as shown on the attached map labeled Exhibit "A".

AREA:

0.039 Acres (1,700 square feet), more or less.

ZONING:

State Land Use District: Urban
County of Honolulu CZO: Industrial (I-2)

TRUST LAND STATUS:

Section 5(a) lands of the Hawaii Admission Act.

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution:

YES ____ NO X

CURRENT USE STATUS:

Governor's Executive Order No. (EO) 571, setting aside 35.22 acres to the Board of Prison Directors (Department of Public Safety) for Territorial Penitentiary Site Purposes.

Governor's Executive Order No. 861, withdrawing 0.084 acres from EO571 for road widening purposes.

Governor's Executive Order No. 1367, withdrawing 9,964 square feet (0.229 Ac) from EO571 for exchange purposes.

Governor's Executive Order No. 1383, adding 13,051 square feet (0.30 Ac) to EO571 for the purpose of straightening the boundaries of the penitentiary site in exchange for lands withdrawn in EO1367 above.

Governor's Executive Order No. 1491, withdrawing 13.50 acres from EO571 and effectively canceling EO1383 above.

Governor's Executive Order No. 1699, withdrawing 5.178 acres from EO571.

Area remaining under Governor's Executive Order No. 571: Approximately 16.5 Acres.

PURPOSE OF SET ASIDE:

Highway purposes.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

This action before the Board is merely a transfer of management jurisdiction and does not constitute a use of State lands or funds, and therefore, this action is exempt from the provisions of Chapter 343, HRS, relating to environmental impact statements. Inasmuch as the Chapter 343 environmental requirements apply to Applicant's use of the lands, the Applicant shall be responsible for compliance with Chapter 343, HRS, as amended.

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Coordinate with the Department of Accounting and General Services (DAGS), Survey Division to process and obtain County subdivision approval; and,
- 2) Provide survey maps and descriptions according to State DAGS standards and at Applicant's cost;

REMARKS:

Newfair Investments, LLC (Newfair) is the owner of property identified as Tax Map Key: (1) 1-2-13:06, which lies adjacent to the Ewa side of the Oahu Community Correctional Center (OCCC) in Kalihi and was formerly occupied by Foremost Dairies-Hawaii, Ltd. Newfair is attempting to sell their property and in the process, discovered that it is landlocked by a portion of State land occupied by OCCC. Because Newfair does not possess clear title, it is unable to sell its property and is requesting the State to provide them legal access to Kamehameha Highway.

By Governor's Executive Order (EO) No. 571, 35.22 acres, including the OCCC site, were set aside to the Department of Public Safety (DPS) for a prison facility. Over time, portions were withdrawn and conveyed to both private landowners and the City and County for road widening purposes, leaving a remaining area of approximately 4.006 acres and what is now Tax Map Key: (1) 1-2-13:02.

By Governor's Executive Order No. 1699, dated September 16, 1955, 5.178 acres were withdrawn from EO571, subdivided and sold by public auction, resulting in the conveyances of Tax Map Keys: (1) 1-2-013:06 (Newfair) and 07, which is owned by Lenakona Development, Ltd. and is now occupied by Gaspro (refer to Exhibit "A"). According to the Land Office Deeds issued for both properties, two (2) areas of access to Kamehameha Highway were granted to parcel 6 on both ends of the property fronting the highway, and one (1) area of access to parcel 7 on the Diamond Head end of property. The deeds also reference them as "vehicle access into and from Kamehameha Highway" (refer to Exhibit "B").

However, according to the City and County tax map, a narrow tail-like section of parcel 2 (referred herein to as the "subject area") obstructs all three designated access ways, landlocking parcel 6 and separating most of parcel 7 from the highway. Parcel 7 is not landlocked because the main access is on the Ewa side of their property located beyond the subject area, which incorporates the use of a driveway on the adjacent lot. The owners of parcel 7 have not inquired with the State regarding their obstructed Diamond Head access, but will be affected by the outcome of this request, wherefore

they are referenced in this submittal.

After reviewing the Governor's Executive Orders relating to the OCCC site, staff notes that the subject area was inadvertently excluded from previous withdrawals from EO571, which explains parcel 2's unusual configuration. Incidentally, the State's survey maps for EO1699 and the Land Office Deeds for parcels 6 and 7 all show Kamehameha Highway being directly adjacent to parcels 6 and 7, suggesting that the subject area was previously recognized as part of Kamehameha Highway. (Survey maps relating to the above are attached herewith as Exhibits "C", "D", and "E" respectively).

By memorandum, dated February 27, 1952 and enclosed as Exhibit "F", Special Deputy Attorney General George P. Siu stated that the subject area, described as a portion of "Parcel 71" on the attached map, was never withdrawn from EO571. Mr. Siu recommended that: a) Parcel 71 be withdrawn from the jurisdiction from the Board of Prison Directors (EO571); and b) that the Department of Public Lands be notified that Parcel 71 is within the right-of-way area of highway project SN-FAP-9D (4) Kamehameha Highway, 2nd Unit.

By letter dated April 18, 1952 (enclosed as Exhibit "G"), Territorial Highway Engineer R. M. Belt replied that the area referenced by Mr. Siu was regarded as "an essential part of the right-of-way and has been treated as such by the prison people." Mr. Belt agreed with Mr. Siu's recommendations and added that "a record be made of the fact that the subject area was under their control for highway purposes".

According to staff's files, it appears the State did not follow through with Mr. Siu's recommendations. Staff also believes that public lands would not be intentionally sold to private landowners in the 1950's without legal access.

Staff originally considered requesting access easements for parcels 6 and 7, or submitting a recommendation to sell the subject area to the abutting landowners as remnants. However, staff did not feel justified in requiring landowners to pay for access rights they were already entitled to and were presumed to have received at the time their property was purchased from the State. Although Newfair has expressed some interest in purchasing the subject area fronting their property, complications would arise if the owners of parcel 7 declined or were unable to purchase the portion fronting their property, leaving the State a small unencumbered remnant.

Staff therefore requests that the portion of parcel 2 fronting TMK's: (1) 1-2-13:06 and 07 be withdrawn from EO571, and re-set aside to DOT with a management right-of-entry. In doing so, the subject area will be incorporated into Kamehameha Highway and this will ensure legal access for the abutting parcels. Newfair has also requested a right-of-entry to be issued to them, their assigns and successors over the subject area

pending the execution of the set aside to DOT to legitimize interim access rights.

Both DPS and DOT have concurred with the proposed withdrawal from EO571 and set aside of the same to DOT for highway purposes (refer to Exhibit "H").

Staff further declares that as a condition of this withdrawal and set aside to DOT, the Department of Land and Natural Resources shall be indemnified and held harmless of any loss, liability, claim or demand for compensation relating to or connected with the granting of this request with respect to any requirement that may be imposed on the abutting landowners from DOT.

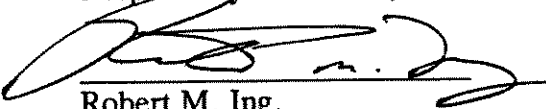
Staff requested comments from the City and County of Honolulu, which was given until the date of this Land Board meeting to respond. Lenakona Development, Ltd. was also notified of this request and was asked to submit any comments and/or to attend this Land Board meeting to offer testimony. Otherwise, no other government agency or community group was solicited because this request involves only a change in management jurisdiction and does not involve a change of use.

RECOMMENDATION: That the Board:

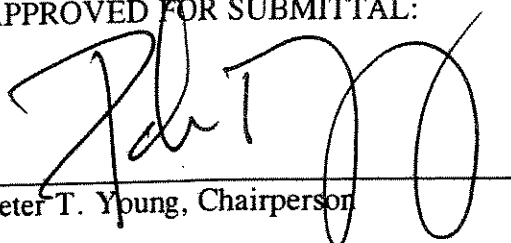
1. Approve of and recommend to the Governor issuance of an executive order withdrawing 0.039 acres, more or less, said lands being further described in Exhibit "A" included herein, from the Governor's Executive Order No. 571, subject to the following:
 - A. The standard terms and conditions of the most current executive order form, as may be amended from time to time;
 - B. Disapproval by the Legislature by two-thirds vote of either the House of Representatives or the Senate or by a majority vote by both in any regular or special session next following the date of the setting aside;
 - C. Review and approval by the Department of the Attorney General; and
 - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
2. Approve of and recommend to the Governor the issuance of an executive order setting aside the subject lands to the Department of Transportation, Highways Division under the terms and conditions cited above in the 'Remarks' section, which are by this reference incorporated herein and subject further to the following:

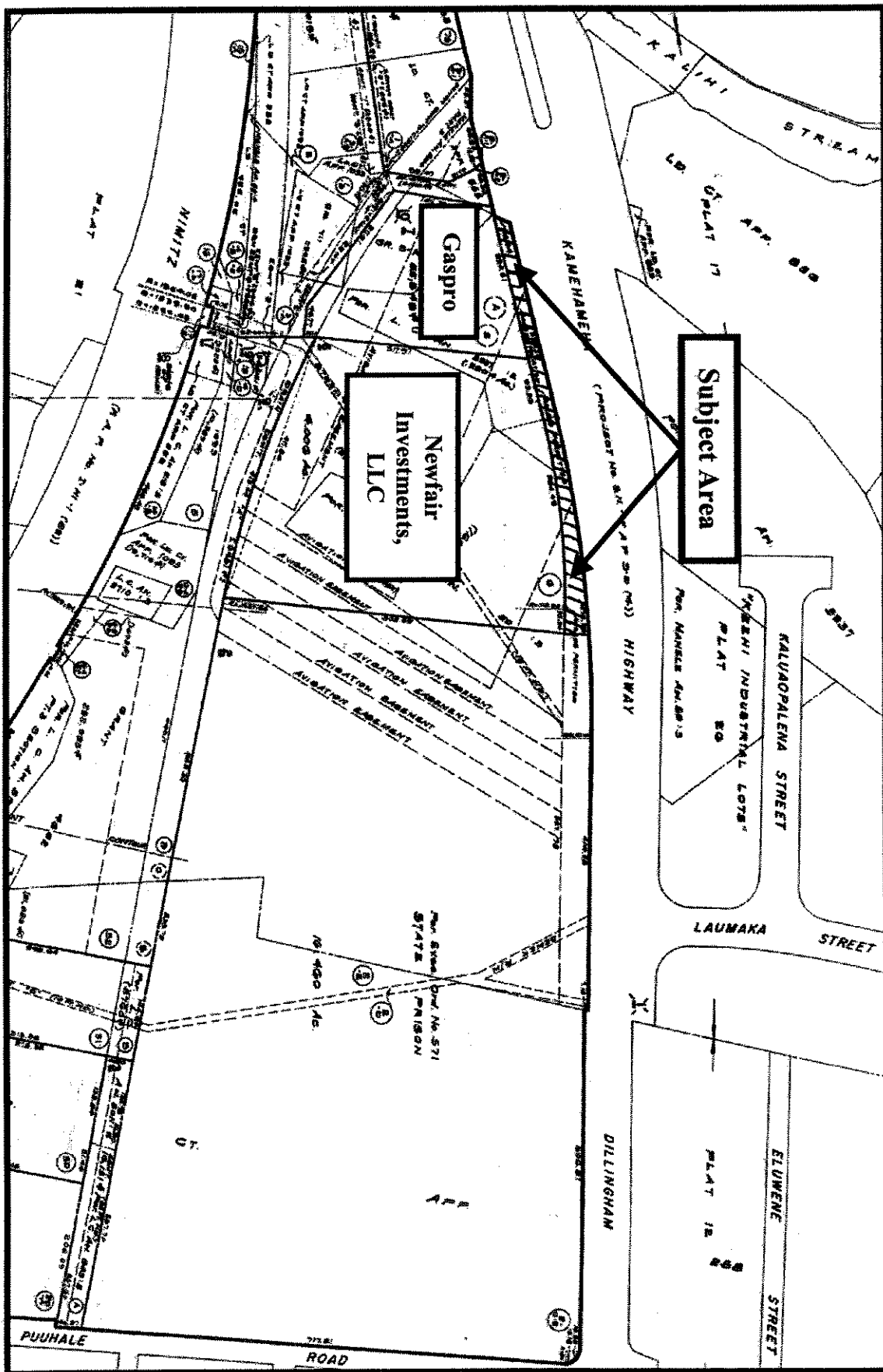
- A. The standard terms and conditions of the most current executive order form, as may be amended from time to time;
 - B. Disapproval by the Legislature by two-thirds vote of either the House of Representatives or the Senate or by a majority vote by both in any regular or special session next following the date of the setting aside;
 - C. Review and approval by the Department of the Attorney General; and
 - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. Authorize the issuance of a Management Right-of-Entry to the Department of Transportation, Highways Division and also to the owner(s) of properties identified as Tax Map Keys: (1) 1-2-13:06 and 07, and their respective successors or assigns, covering the subject area under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
- A. The standard terms and conditions of the most current right-of-entry permit form, as may be amended from time to time;
 - B. The Management Right-of-Entries will terminate automatically at the time the subject area is subdivided from the remainder of lands encumbered by Governor's Executive Order No. 571, and jurisdiction of the same is transferred to the Department of Transportation for highway purposes; and
 - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,


Robert M. Ing,
Lang Agent

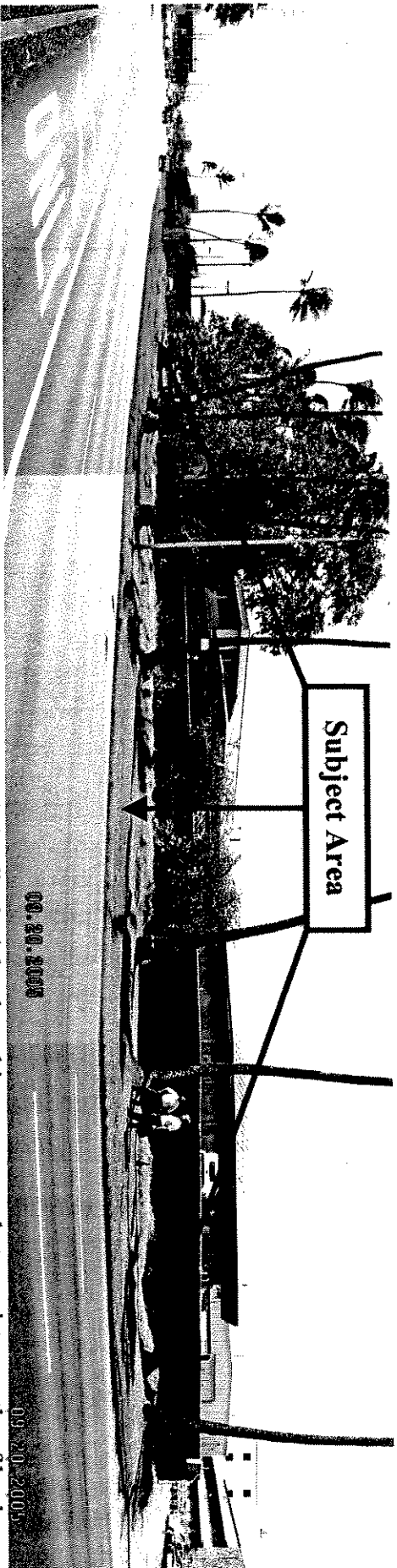
APPROVED FOR SUBMITTAL:


Peter T. Young, Chairperson

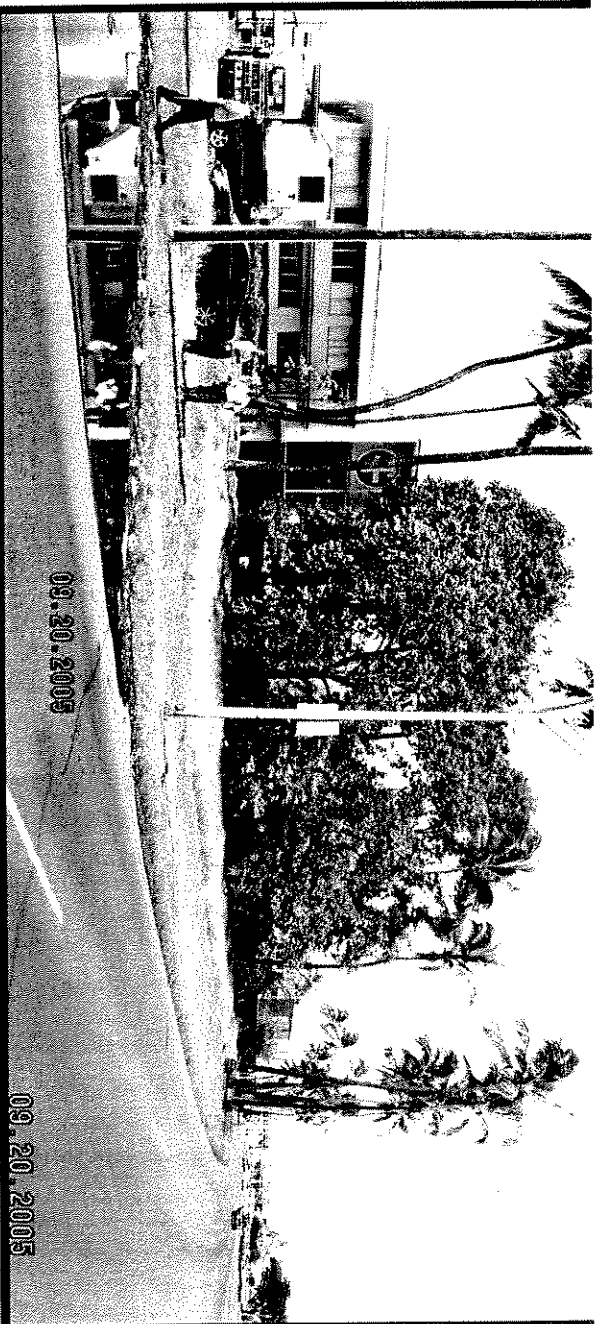


Withdrawal from EO571 to the Department of Public Safety; Set Aside to DOT-Highways
 TMK: (1) 1-2-013:Portion 02

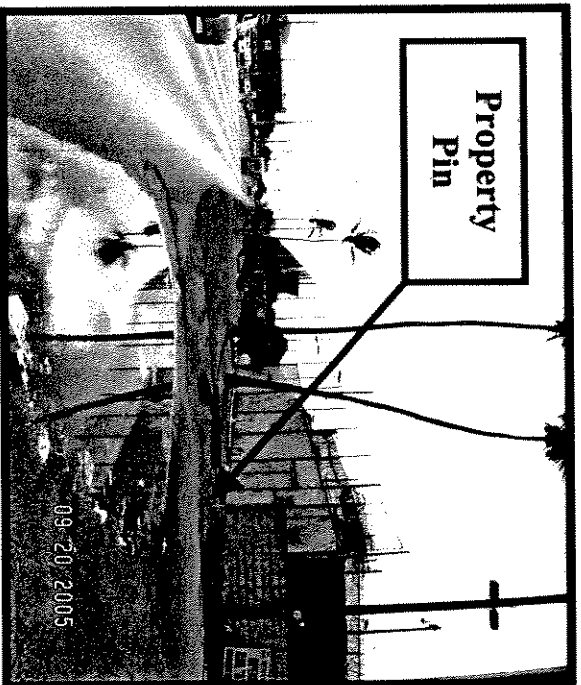
Withdrawal from EO571 to Dept. of Public Safety and Set Aside to DOT-Hwys
Kalihi-Kai, Honolulu, Oahu, TMK: (1) 1-2-013:portion of 02



(Figure 1) Both the Diamond Head and Ewa entrances of Parcel 6 above is landlocked by the subject property that consists mostly of landscape area. Property pins were found among the row of coconut trees.



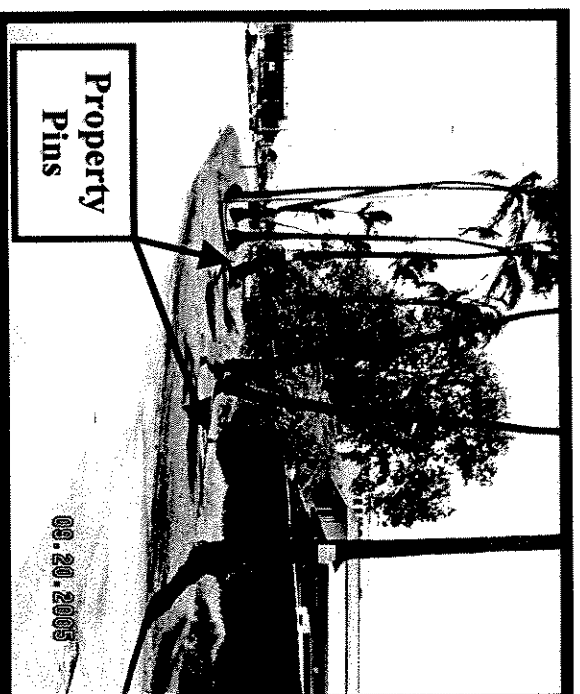
(Figure 2) Diamond Head entrance to parcel 6, facing in the Ewa direction on Kamehameha Highway (Dillingham Blvd). OCCC is situated further the left of this photo.



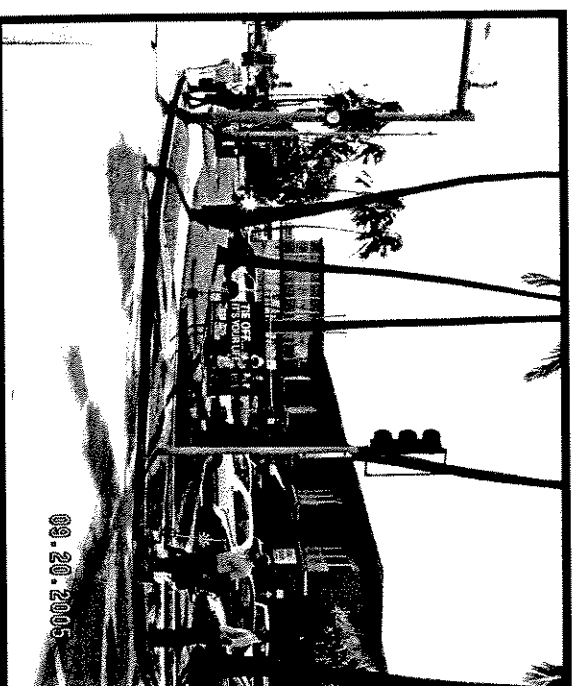
(Figure 3a) Parcel 6 Diamond Head entrance.



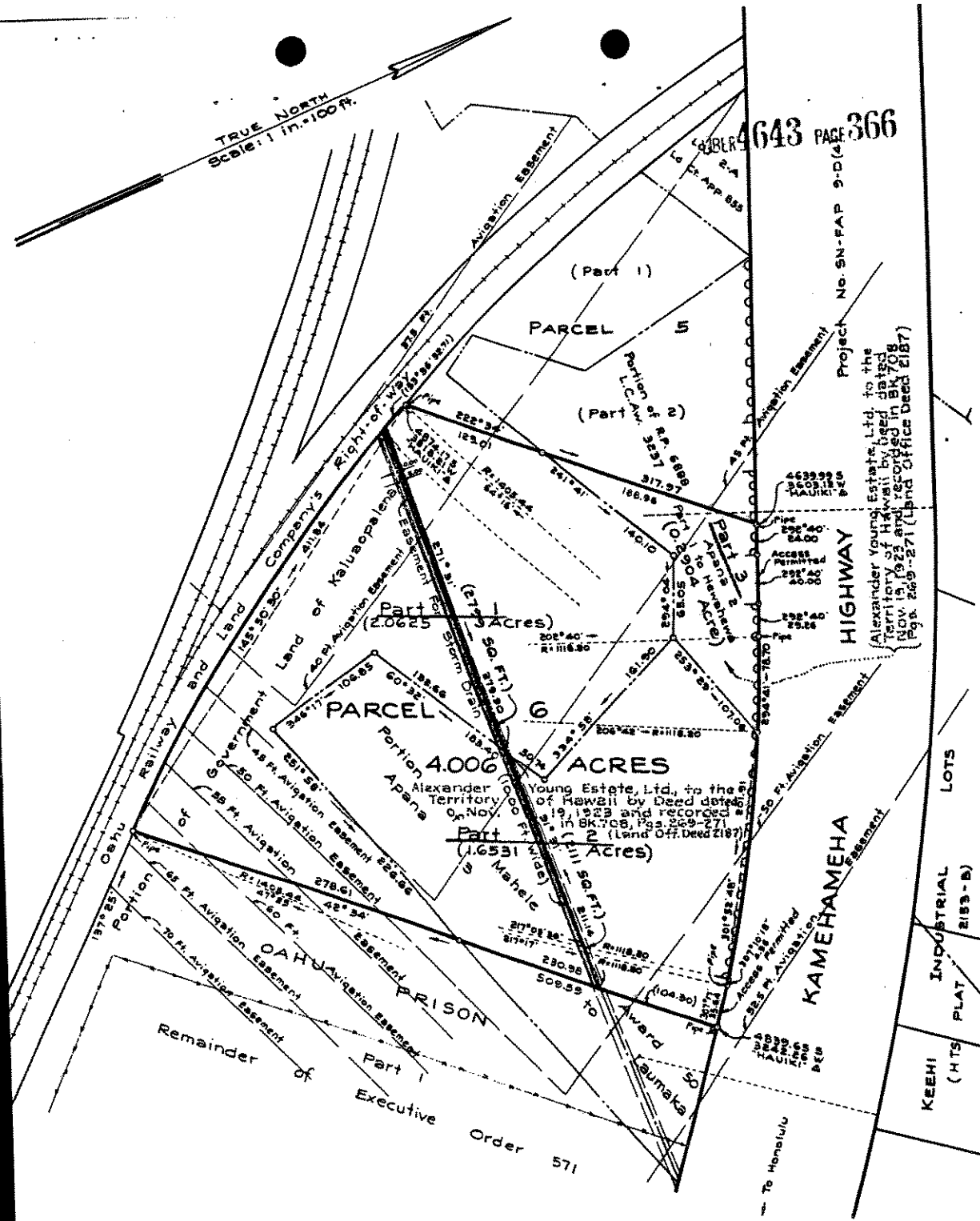
(Figure 3c) Diamond Head entrance to parcel 7. The Ewa entrance to Parcel 6 is further ahead.



(Figure 3b) Front of parcel 6, facing toward Diamond Head. The Ewa entrance is to the right.



(Figure 3d) Parcel 7 Ewa entrance where the only legal access exists. The subject area ends somewhere near the coconut trees in the center of the photo.



(Revised October 1963)
 KEEHI INDUSTRIAL LOTS
 PARCEL 6, PARTS 1, 2 AND 3
 Kalihi, Honolulu, Oahu, Hawaii
 Scale: 1 inch = 100 feet

JOB 1655
 Calc. BK. 3 (Hashimoto)
 Calc. BKS. 3, 9 (Fukuya)

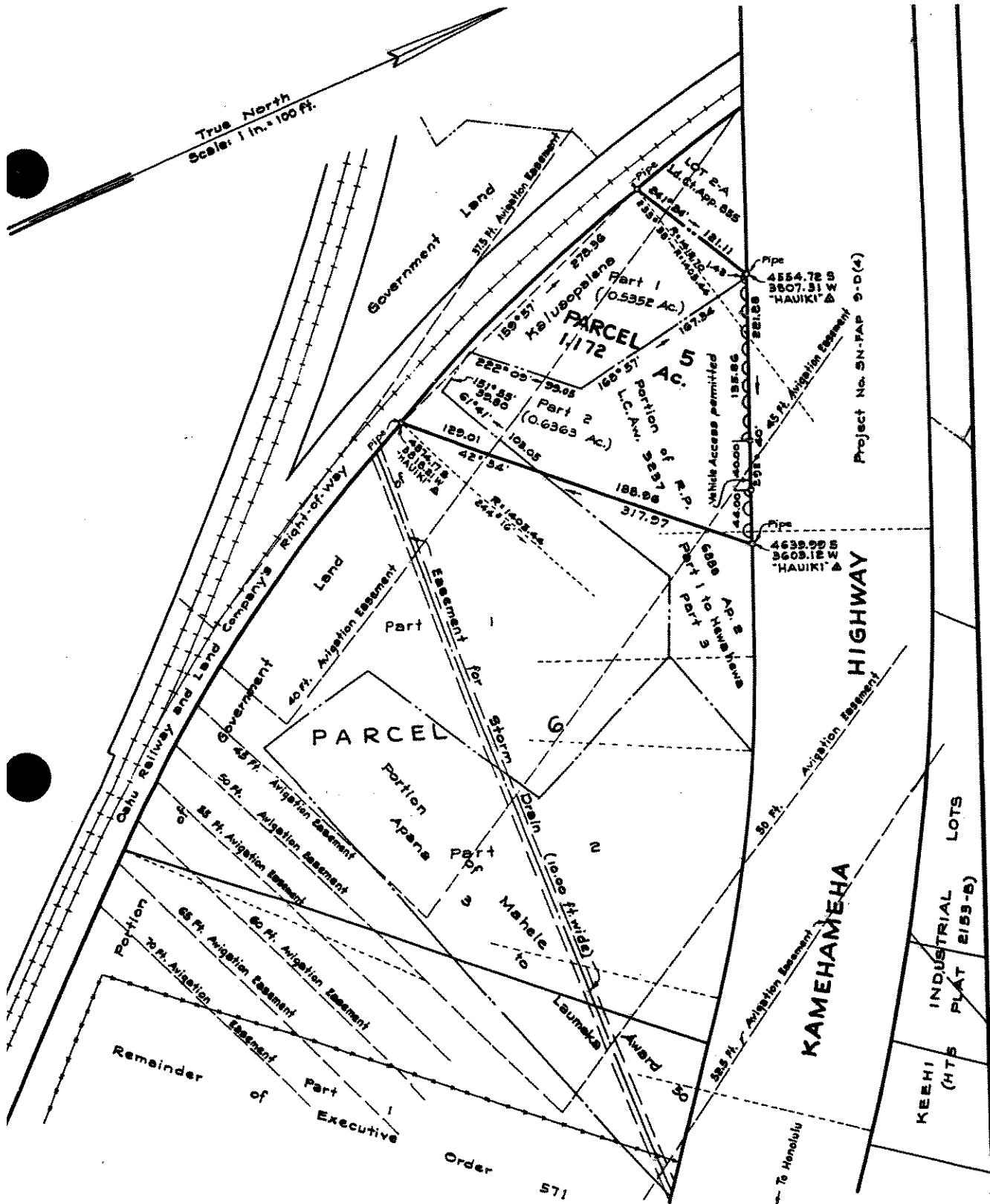
d h denotes vehicle access permitted
o o o denotes no vehicle access permitted

Aviation contour lines furnished by
 HAC Oct. 14, 1955.
 Based on Mean Sea level

SURVEY DIVISION
 DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

TAX MAP: 1-2-13

EXHIBIT "D"



KEEHI INDUSTRIAL LOTS

PARCEL 5

Parts 1 and 2

Delineating Location of Rights of Vehicle Access Which will be Permitted

Kalihi, Honolulu, Oahu, Hawaii

Scale: 1 inch = 100 feet

JOB 222

C. BK

— denotes vehicle access permitted
---- denotes no vehicle access permitted

Aviation Contour Lines
 furnished by HAC - Oct. 14, 1955
 Based on Mean Sea Level

SURVEY DIVISION

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
 STATE OF HAWAII

TAX MAP: 1-2-13

D.F. February 8, 1962

EXHIBIT "E"

3.7597

Feb. 27, 1952

MEMORANDUM

TO: Mr. R. W. Hendry,
Highway Construction and Maintenance Engineer

FROM: George P. Siu,
Special Deputy Attorney General

SUBJECT: Confirmation of Right-of-Way Boundaries for
Project SN-FAP-9D(4) Kamehameha Highway, 2nd Unit

REFERENCE: Your Letter No. 11658, March 17, 1950

A thorough study of the title to the various parcels shown on the copy of Map No. 5142.6 reveals the following pertinent information:

- (1) That portion colored in yellow indicates the old roadway;
- (2) Those portions colored in red were acquired by the Territory by Final Order of Condemnation in Law No. 17163-A, subject, however, to an easement in favor of the Oahu Railway and Land Co. "to lay and maintain tracks on and passing over said parcels for railroad purposes only, in such manner and to such extent as shall be convenient with the construction and use of a public road thereon."

At this time no comment will be made whether or not the easement has or has not been abandoned by the Oahu Railway and Land Co.;

- (3) That portion colored in green, which lies Mauka of the highway and which is designated as Parcel 72 (Revised), with an area of 57,957 sq. ft. or 1.330 acres, together with the remaining area of Part 2 of Executive Order No. 571, was withdrawn from the jurisdiction of the Board of Prison Directors by Executive Order No. 1491 for the Keehi Industrial Lot Subdivision. The Office of the Territorial Surveyor has adhered to the boundary designated on the map as "present right-of-way boundary" in the designing and subdividing of the Keehi Industrial Lot Subdivision.

EXHIBIT "F" 77

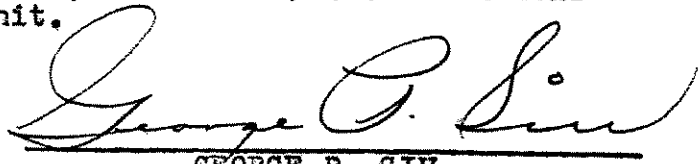
Feb. 27, 1952

It must be noted, however, that Parcel 72 is subject to easements for sewer line purposes as shown on the map. Said areas were made subject to the easements by Executive Order No. 570.

- (4) That portion colored in green, which lies Makai of the highway is designated as Parcel 71 (Revised), with an area 38,654 sq. ft. or 0.887 acre. Said Parcel 71, a portion of Part 1, Executive Order No. 571, has never been withdrawn from the jurisdiction of the Board of Prison Directors.

It is recommended that the following steps be taken:

- (1) That Parcel 71 be withdrawn from the jurisdiction from the Board of Prison Directors;
- (2) That the Department of Public Lands be notified that both Parcels 71 and 72 are within the right-of-way area of Project SN-FAP-9D(4) Kamehameha Highway, 2nd Unit.



GEORGE P. SIU
Special Deputy Attorney General

APPROVED:

WILFORD D. GODBOLD
Special Deputy Attorney General,
In Charge of the Division of
Surveys and Rights of Way.

PARSONSON

Street Man.
to be placed by the Contractor under
the direct supervision of the Engineer.

2' 66" Slope 2pc Line (Not)
PT. Sta 209+24.53, 6 North
Sta 209+18.80, 6 Model Trip

PART 2

Extend existing 24" culvert as detailed

ORDER

SITE

3/17/70

DATE	3/17/70
BY	W. J. BROWN
CHECKED	
APPROVED	

END OF PROJECT





IN REPLY REFER
TO LETTER NO.

2.16861

TERRITORY OF HAWAII
TERRITORIAL HIGHWAY DEPARTMENT
HONOLULU

APR 18 1952

Mr. Wilford D. Godbold
Special Deputy Attorney General
Territorial Office Building
Honolulu, T. H.

Subject: Right-of-Way for Project SN-FAF 9D(4)
Kamehameha Highway

Dear Mr. Godbold:

Reference is made to your memorandum to Mr. R. W. Hendry of the department dated February 27, 1952 (letter 3.7597) in re the above subject.

Both parcels 71 and 72 revised are essential parts of the right-of-way and have been treated as such by the prison people. However, we feel that your recommendations should be followed and a record made of the fact that they are under our control for highway purposes.

Will you please attend to this matter.

Very truly yours,

R. M. BELT
Territorial Highway Engineer

RWH:gcp

EXHIBIT "G"

DIR 1047

LINDA LINGLE
GOVERNOR OF HAWAII



PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

August 18, 2005

2005 AUG 24 A 10:58

MEMORANDUM

TO: Rodney Haraga, Director
Department of Transportation

Frank J. Lopez, Interim Director
Department of Public Safety

FROM: Peter T. Young, Chairperson
Department of Land and Natural Resources

SUBJECT: Request for legal access to Kamehameha Highway over State land encumbered by Governor's Executive Order No. 571 to the Department of Public Safety.

LOCATION: Fronting the Oahu Community Correctional Center (OCCC); Kalihi-Kai, Honolulu, Oahu; TMK: (1) 1-2-13:Portion of 02.

APPLICANT: Newfair Investments, LLC.

DEPT OF TRANSPORTATION
2005 AUG 25 P 2:34
HIGHWAYS DIVISION
LD-RI

Our Land Division has recently been contacted by Newfair Investments, LLC (Newfair) regarding their property most recently occupied by Foremost Dairies-Hawaii, Ltd (Foremost), located at 2277 Kamehameha Highway in Kalihi, and further identified as tax map key: (1) 1-2-13:06. The subject property lies adjacent to the Ewa side of TMK: (1) 1-2-13:02, which is encumbered by Governor's Executive Order No. 571 (EO571) to the Department of Public Safety and houses the Oahu Community Correctional Center (OCCC).

As you may know, Foremost has ceased operating at the Kalihi site, and Newfair has secured a buyer for the land. Both Newfair and the buyer discovered, however, that the property is landlocked from Kamehameha Highway by a portion of parcel 2. Therefore, the buyer has requested Newfair to obtain legal access before finalizing the purchase of the property.

According to our files, the Territory of Hawaii (State) originally conveyed Newfair's property to Foremost by Special Sale Agreement (SSA) No. 3811, dated October 17, 1955, and subsequent Land Office Deed No. S-20,726 on December 6, 1963, before Newfair eventually acquired it. Said conveyance documents designated certain areas at the front of the property specifically for "access to and from Kamehameha Highway", which is a limited access highway. The documents also consisted of State survey maps showing the highway directly abutting the

EXHIBIT "H"

property, making it unnecessary for any access easements to be issued at the time of sale. After reviewing the survey maps for EO571 and the subsequent land withdrawal via EO1699 for it to be sold by public auction, it appears the portion of parcel 2 landlocking Newfair's property was inadvertently excluded and therefore remains encumbered under EO571.

In support of the above statements, we enclose the following for your review:

- 1) Governor's Executive Order No. 571, setting aside lands for Territorial Penitentiary Purposes;
- 2) Governor's Executive Order No. 1699, withdrawing lands, including the Foremost property for sale purposes;
- 3) Special Sale Agreement No. S-3811 to Foremost Dairies-Hawaii, Ltd, dated October 17, 1955;
- 4) Land Office Deed No. S-20,726, conveying the subject property to Foremost Dairies-Hawaii, Ltd.;
- 5) Memo from former Special Deputy Attorney General, Mr. George P. Siu, to Highway Construction and Maintenance Engineer, Mr. R. W. Hendry, dated February 27, 1952, confirming the discrepancy above and which recommends that certain parcels, including the referenced portion of parcel 2, be withdrawn from EO571, and that the Department of Transportation (DOT) be notified that said land is within the right-of-way area of Kamehameha Highway.;
- 6) Letter of reply, dated April 18, 1952, from Territorial Highway Engineer, Mr. R. M. Belt to Special Deputy Attorney General, Mr. Wilford D. Godbold confirming the statements made in the above-referenced memo; and
- 7) Current County tax map showing the above-referenced properties.

We believe the subject portion of parcel 2 was intended as a highway right-of-way area and should be withdrawn from EO571 and set aside to DOT accordingly. We are also aware that a section of the right-of-way area fronts part of the prison facility and is partially paved and fenced and may be used for one of the guard towers (Refer to the enclosed tax map). Said portion of the right-of-way area fronting the OCCC facility is delineated on the County's tax map with a line of dashes, which often represents executive orders to departments of the State and its political subdivisions. Although the Department of Public Safety may not want this particular right-of-way area fronting their facility withdrawn from EO571, it seems appropriate for the State to follow through with withdrawing at least the portion fronting parcels 6 and 7, and setting it aside to DOT.

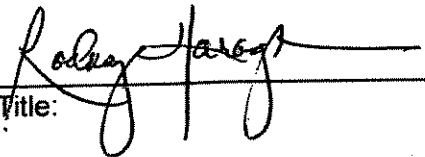
According to my staff, an official from the Department of Public Safety that oversees the OCCC facility indicated they were not maintaining the area fronting parcels 6 and 7, and had no interest in doing so. Furthermore, it seems that withdrawing this area and setting it aside to DOT would immediately provide legal access for Newfair's property as originally intended.

August 12, 2005

Should the statements above meet with your concurrence, please acknowledge by signing in the designated area below and return a copy to our Land Division Office, at 1151 Punchbowl Street, Room 220, Honolulu, Hawaii 96813. We will then proceed to initiate a Land Board action to recommend to the Governor the aforementioned withdrawal and set aside.

If you any questions or concerns regarding the above, feel free to contact Robert Ing of our Oahu District Land Office, at 587-0383.

CONCUR:


Title: _____

Department of Transportation
NOV 28 2005

Dated: _____

CONCUR:

Title: _____

Department of Public Safety

Dated: _____

August 12, 2005

Should the statements above meet with your concurrence, please acknowledge by signing in the designated area below and return a copy to our Land Division Office, at 1151 Punchbowl Street, Room 220, Honolulu, Hawaii 96813. We will then proceed to initiate a Land Board action to recommend to the Governor the aforementioned withdrawal and set aside.

If you any questions or concerns regarding the above, feel free to contact Robert Ing of our Oahu District Land Office, at 587-0383.

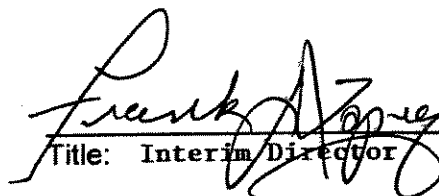
CONCUR:

Title:

Department of Transportation

Dated: _____

CONCUR:



Title: Interim Director

Department of Public Safety

Dated: October 19, 2005

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 9, 2005

PSF:03od-378

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Oahu

Consent to Assign General Lease No. S-4908, Dannielle Ululani (Von Hiram) Beirne and Francis Daniel Beirne, Assignors, to Francis Daniel Beirne, Donald F. Beirne and Clayton Beirne, Assignees, Maunalaha Homesites, Maunalaha, Honolulu, Oahu, Tax Map Key: (1) 2-5-24:03

APPLICANT:

Dannielle Ululani Beirne and Francis Daniel Beirne, as Assignor, to Francis Daniel Beirne, unmarried, Donald F. Beirne, unmarried, and Clayton Beirne, unmarried, as joint tenants, whose mailing address is 541 Aspen Lane, Pomona, California 9767-2373, as Assignees

LEGAL REFERENCE:

Section 171-36(a)(5), Hawaii Revised Statutes, as amended.

LOCATION AND AREA:

Portion of Government lands of Makiki situated at Maunalaha Homesites, Maunalaha, Honolulu, Oahu, identified as Lot 7 and by Tax Map Key: (1) 2-5-24:03, consisting of approximately 0.28 acres, as shown on the attached map labeled Exhibit A.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: YES _____ NO x

CHARACTER OF USE:

Residential purposes as the Lessee's principle domicile.

TERM OF LEASE:

65 years, commencing on December 1, 1983, and expiring on November 20, 2048.

LEASE RENTAL:

\$120.00 per annum, due semi-annually.

DCCA VERIFICATION: Not required for individuals.

APPLICANT REQUIREMENTS:

Sign statement agreeing to abide by and to be bound by the terms, conditions and covenants of the subject lease agreement.

REMARKS:

The Maunaloa Valley direct leases came about as a result of Act 225, SLH 1981, which authorizes the Department of Land and Natural Resources to negotiate and enter into long-term residential leases with persons who meet the following criteria, as approved at the Land Board's meeting on August 12, 1983, agenda item F-14:

1. At the time of enactment of the Act, reside on a parcel or parcels of land in tax map keys (1) 2-5-19 and 2-5-20, or have permits allowing them to reside on such land, or are descendants of persons who lawfully resided on such land before 1920;
2. Have built homes on such land for use as their own residence prior to 1940, pursuant to government authority; and
3. Can prove that the various governments of Hawaii have expressed an intent to grant them long-term tenure.

A list of approved tenants was included in said Board submittal that included Mary K. H. Lopez Palomo.

General Lease No. S-4908 allows assignments with prior Board approval if:

1. The proposed assignee or transferee meets the eligibility criteria set out in Section 2 of Act 225, SLH 1981, or is a descendant or heir, consanguineous or affined, of the assignor or transferor; and
2. The proposed assignee or transferee shall agree in writing, as a condition precedent, to abide by and to be bound by the terms, conditions and covenants of the subject lease agreement.

The lease was first issued to Mary K. H. Lopez Palomo in 1983. The Board approved the consent to assignment from Mary Palomo to Dannielle Ululani Beirne, her daughter, and Francis Daniel Beirne, her son, at its December 12, 1995 meeting under agenda item F-13. Francis Daniel Beirne's children, i.e. his two sons, Donald F. Beirne and Clayton Beirne, are eligible for this lease under Act 225, SLH 1981.

This assignment will resolve the outstanding issue of Dannielle Ululani Beirne holding two leases, each of which requires that it

December 9, 2005

be used as a primary domicile. Staff has worked with Dannielle Ululani Beirne to assign one of them so that the default enforcement process can be avoided. Dannielle Ululani Beirne and Francis Daniel Beirne delivered their assignment document to our office along with birth certificates of Francis Daniel Beirne's sons, Donald F. Beirne and Clayton Beirne.

Francis Daniel Beirne and his sons, Donald and Clayton Beirne, are planning to move to Hawaii and build a new house on the subject parcel to live. The family demolished the former dilapidated dwelling and cleaned up the area. Building plans have been prepared for a new residence but several large trees and the crumbling retaining wall that supports Maunalaha Road need to be taken care of first.

The lessees are current with their rent until November 30, 2005 and the liability insurance is current until April 12, 2006. There were two Notice of Default letters mailed during the past two years for late rent and for expired insurance. The rent was paid within the cure period. The insurance coverage was continuous but the certificate was not provided on a timely basis.

The Assignee has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

No agency or community comments were solicited.

RECOMMENDATION:

That the Board consent to the assignment of General Lease No. S-4908, Dannielle Ululani Beirne and Francis Daniel Beirne, as Assignor, to Francis Daniel Beirne, Donald F. Beirne and Clayton Beirne, Assignees, subject to the following:

1. The standard terms and conditions of the most current consent to assignment form, as may be amended from time to time;
2. Review and approval by the Department of the Attorney General; and
3. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

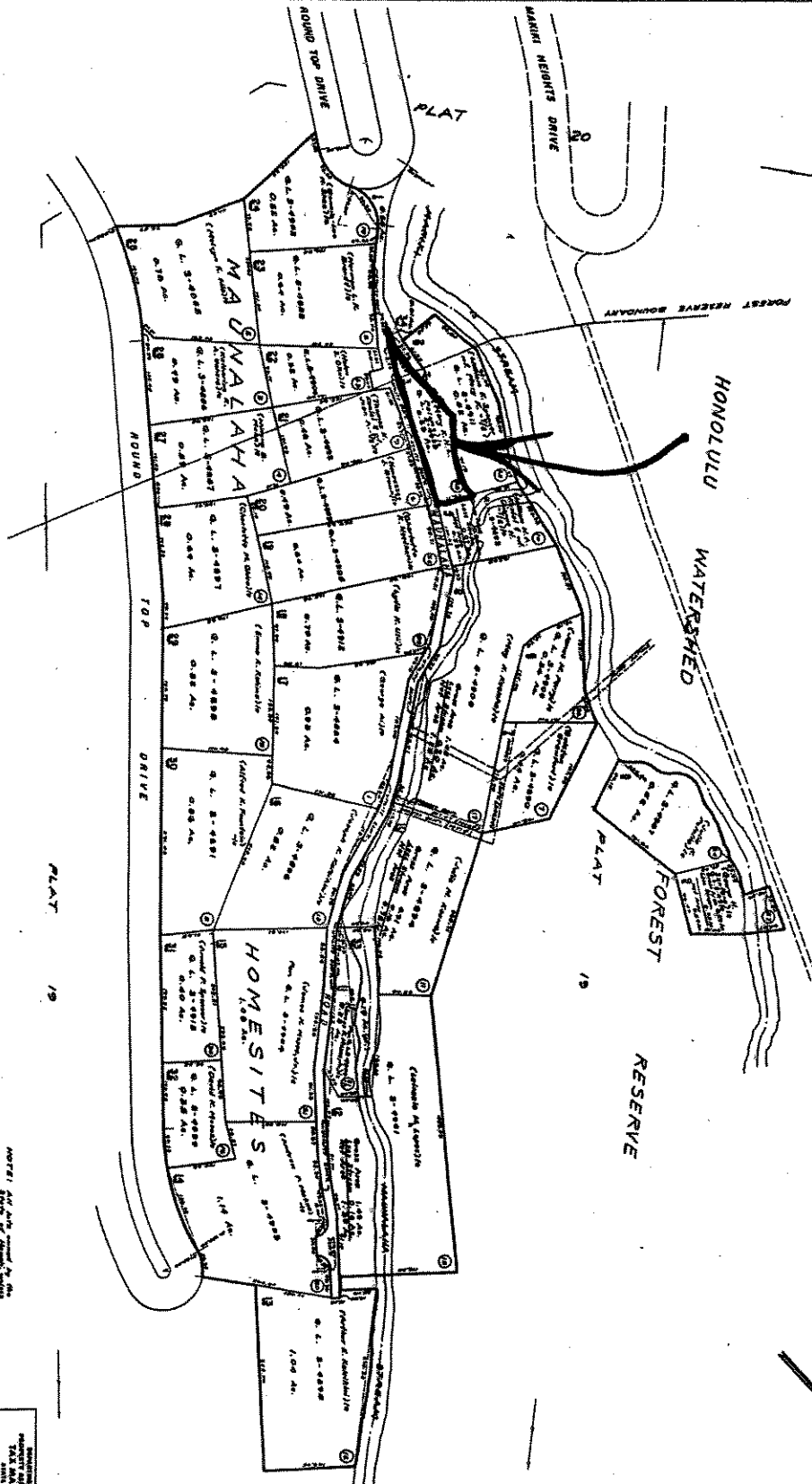
Respectfully Submitted,


Al Jodar
Land Agent

APPROVED FOR SUBMITTAL:


Peter T. Young, Chairperson

MAKANI & TANTALUS, OAHU, HAWAII, "MAUNALANA HOMESITES" (P.L. 5-5-19 & 20)



NOTES: 1. See also Record of Title for this project.

FOR PROPERTY ASSUMING PURPOSES
SUBJECT TO CHANGE

RECORD OF TITLE			
TAX MAP SECTION			
TAX MAP			
LOT	SECTION	TAX MAP	DATE
2	5	24	

EXHIBIT A

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 9, 2005

05od-251

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Oahu

Consent to Assign and Amendment to Lease of Non-Exclusive
Easement No. S-5388, Rodney William Howard & Mary Therese
Pattee, Assignors, to Bret Csupo and Gabor Csupo, Assignees,
Lanikai, Koolaupoko, Oahu, Tax Map Key: (1) 4-3-04:99
seaward

APPLICANT:

Rodney William Howard & Mary Therese Pattee, as Assignors, to
Bret Csupo and Gabor Csupo, husband and wife, as tenants by the
entirety, whose address is 12835 Mulholland Drive, Beverly Hills,
California 902310, as Assignees.

LEGAL REFERENCE:

Section 171-36(a)(5), Hawaii Revised Statutes, as amended.

LOCATION AND AREA:

Portion of Government lands of Kailua situated at Lanikai,
Kailua, Koolaupoko, Oahu, identified by Tax Map Key: (1) 4-3-
04:99 seaward, consisting of approximately 26 square feet, as
shown on the attached map labeled Exhibit A.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act.

DHHL 30% entitlement lands pursuant to the Hawaii State
Constitution: YES _____ NO x

CHARACTER OF USE:

Right, privilege, and authority to construct, use, and maintain a
seawall.

TERM OF LEASE:

65 years, commencing on February 1, 1995 and expiring on January
31, 2060.

ANNUAL RENTAL:

\$190.16. (There is an annual increase of 2% each year up to and
including the 15th year.) The annual rental shall be reopened
and redetermined following the expiration of the 15th, 30th, 45th

and 60th years.

CONSIDERATION:

\$0.00

DCCA VERIFICATION: Not required for individuals.

REMARKS:

The Land Board approved the issuance of this seawall easement by direct negotiation at its January 27, 1995 meeting (see Exhibit B).

The purpose of the assignment is to include the seawall easement with the sale of Rodney Howard and Mary Pattee's adjacent private property to the above-named Assignees.

The Assignors are in compliance with the easement conditions and there have not been any defaults of the conditions in the past two years.

The Assignees have not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

No agency or community comments were solicited.

Staff notes that the most current seawall easement document form includes a standard condition that allows the easement to inure to the benefit of the abutting property. The grantee only needs to inform his successor of our liability insurance requirement when the easement is sold. This provision saves a lot of time of the Board, staff, Department of the Attorney General and grantee. The subject easement does not contain this condition. Staff is requesting the subject easement, Grant of Non-Exclusive Easement S-5388, be amended to add such condition.

RECOMMENDATION:

That the Board:

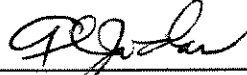
1. Consent to the assignment of Lease of Non-Exclusive Easement No. S-5388, Rodney William Howard & Mary Therese Pattee, Assignors, to Bret Csupo and Gabor Csupo, Assignees, subject to the following:
 - A. The standard terms and conditions of the most current consent to assignment form, as may be amended from time to time;
 - B. Review and approval by the Department of the Attorney General; and
2. Amend Lease of Non-Exclusive Easement S-5388 to include the following condition:

December 9, 2005

"The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (1) 4-3-04:99, provided that when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document"

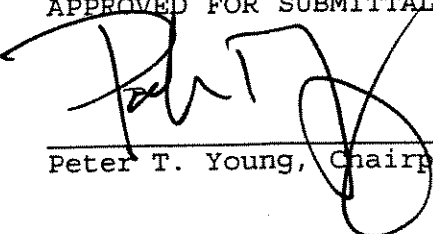
- A. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Al Jodar
Land Agent

APPROVED FOR SUBMITTAL:



Peter T. Young, Chairperson

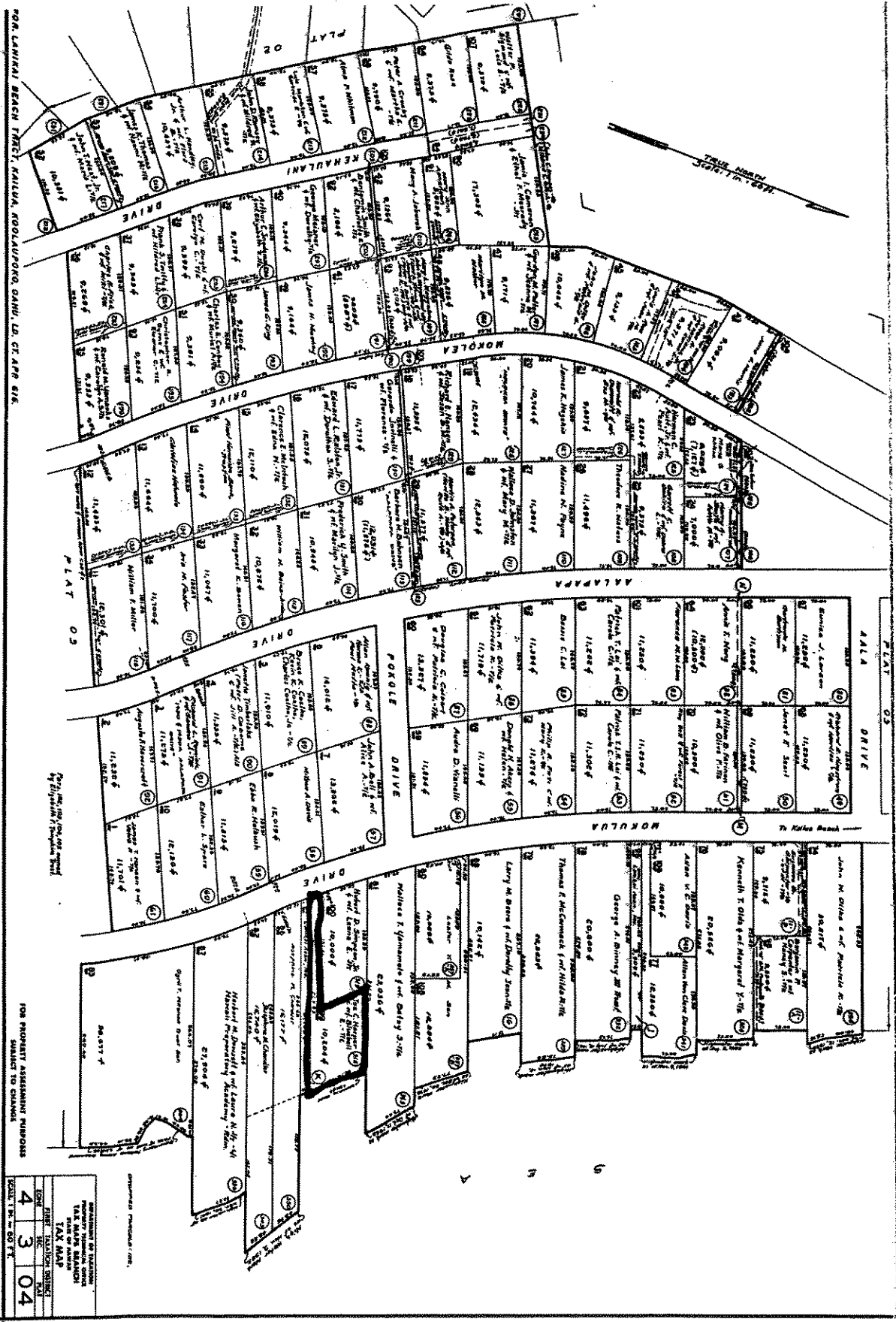


EXHIBIT "A"

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Land Management
Honolulu, Hawaii

January 27, 1995

*David Frankel
OSP - concern about issuance of easement*

Board of Land and
Natural Resources
Honolulu, Hawaii

OAHU

Subject: Staff Request Authorization for Issuance of Non-Exclusive Term
Seawall Easement, Lanikai, Kailua, Koolaupoko, Oahu, TMK: 4-
3-04:99 (Seaward of)

STATUTE: Chapter 171-53, Hawaii Revised Statutes

APPLICANT: ALAN S. LLOYD, Trustee of the Estate of Bluebell Harper

LOCATION: Lanikai, Kailua, Koolaupoko, Oahu, shown colored in red on the
tax map (TMK: 4-3-04) labeled Land Board Exhibit "A" appended
to the basic file.

AREA: 26 sq. ft., more or less (Final determination to be made by
the State Survey Office)

FOR: Sixty-five (65) year non-exclusive seawall easement

PURPOSE: Right, privilege and authority to construct, use and maintain
a seawall over, under, and above State-owned submerged land.

COMMENCEMENT
DATE: First day of the following month of the Land Board approval
granting the subject seawall easement

TERM: Sixty-five (65) years

ZONING: State Land Use Commission: Conservation

LAND TITLE
STATUS: Ceded land, Sub-section 5(B) of the State Admissions Act.

ANNUAL RENTAL: To be determined by independent appraiser, subject to review
and approval by the Chairperson.

There shall be an annual rental increase of 2% of the previous
lease except the 16th,
the applicant, from Alan S. Lloyd trustee of the Estate of Bluebell Harper to Alan S. Lloyd,
cessor Trustee of the Bluebell Emma Harper
vorable Living Trust dated August 27, 1991 and
cessor Trustee of the Joseph Chalmer Harper
vorable Living Trust dated August 27, 1991.
APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON

EXHIBIT "B"
ITEM F-7

January 27, 1995

RENTAL REOPENINGS:

There shall be rental reopenings at the end of the 15th, 30th, 45th and 60th years of the easement term.

CDUA REQUIRE-
MENTS:

Construction of the subject seawall took place prior to 1955 which is prior to the State Conservation Laws. A CDUA permit is not required.

OEQC REQUIREMENTS:

Chapter 343, Hawaii Revised Statutes, as implemented by Title 11-200-8(1) of the Hawaii Administrative Rules exempts the application of the OEQC requirements on operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing.

REMARKS:

Mr. Alan S. Lloyd is the Trustee of the Estate of Bluebell Harper which holds the title to a ocean-front lot in Lanikai, Koolaupoko, Oahu, identified as TMK: 4-3-04:99. Upon checking on the documentation of this lot, Mr. Lloyd discovered through recent surveys that the Harper's seawall encroached upon State-owned land seaward of their seaward property line. The encroached area amounted to twenty-five (25) sq. ft.

Mr. Lloyd is married to the daughter of the late Mrs. Bluebell Harper, and has provided the Division with information establishing that he dated Mrs. Harper's daughter, Barbara, in 1954 and visited the subject lot frequently in 1954. He also states that at that time the subject portion of the seawall was in existence.

Staff has sent out surveys to the Lanikai Community Association, the Lanikai-Kailua Neighborhood Board, the City and County Public Works and have received no negative comments.

Staff has determined that the encroached area does not interfere with the public access along the seaward shoreline.

Mr. Lloyd requests the issuance of a grant of easement to resolve this encroachment.

RECOMMENDATION:

That the Board:

- A. Find that the subject easement will not interfere with public access along the shoreline.
- B. Find that the area in question to be an economic unit in terms of the use to which the area will be put.
- C. Impose a fine of \$500.00 for encroachment upon State land pursuant to the Chapter 171-6(12) of the Hawaii Revised Statutes.
- D. Authorize granting to Alan S. Lloyd, Trustee of the Estate of Bluebell Harper the above-described grant of easement under the terms and conditions listed above which are by this reference incorporated herein, and subject to the following terms and conditions:
 1. The lessee shall use the easement for seawall purposes only.
 2. Standard abandonment clause
 3. Standard indemnity and hold-harmless clause.
 4. Standard liability insurance policy clause.
 5. Upon abandonment or expiration of the easement, if desired by the Grantor, the grantee, its successors or assigns, at its cost and expense, shall remove the seawall and restore the area to a condition satisfactory to the Grantor.
 6. Submission of two sets of a survey map and description of metes and bounds.
 7. The public shall have access across the easement area.
 8. Prior approval of the Governor of the State of Hawaii.

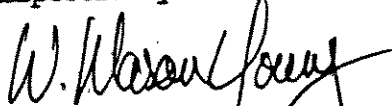
BLNR - Alan S. Lloyd

-4-

January 27, 1995

9. Prior authorization of the Legislature by concurrent resolution.

Respectfully submitted,



W. MASON YOUNG
Land Management Administrator

CPs

APPROVED FOR SUBMITTAL:



MICHAEL D. WILSON, Chairperson

D-12

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 9, 2005

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 99od-251

OAHU

Amend Prior Board Action of July 14, 2000, Item D-30;
Sale of Reclaimed Land to Sherryl Buecher, Koolaupoko,
Oahu, TMK (1) 4-4-7:17 seaward

BACKGROUND:

On July 14, 2000, under agenda Item D-30, the Board authorized the sale of reclaimed land to Ms. Buecher. Recommendation 2.a of the Board's approval stipulated that:

"Prior to the issuance of the conveyance document, the applicant shall consolidate the reclaimed parcel with her abutting property through the County consolidation process."

One requirement in the Applicant Requirements Section also asks for the consolidation. During the preparation of document process, the Department of the Attorney General questioned if the applicant had consolidated the reclaimed land as stipulated in the July 14, 2000 Board approval. Staff understands that the required approval for consolidation has not been obtained as yet. However, upon review by the Department of the Attorney General, it appears that consolidation may not be necessarily required before the issuance of the conveyance document; consolidation may occur after the conveyance.

A similar case was considered by the Board on June 22, 2001, agenda item D-16, in which the same language requiring consolidation approval prior to the issuance of the deed was deleted from the Board's approval, to streamline the process.

Staff recommends the Board amend its prior action of July 14, 2000, agenda Item D-30 by deleting Recommendation 2.a from the Recommendation Section and any reference to consolidation in Applicant Requirements Section.

RECOMMENDATION:

That the Board amend its prior action of July 14, 2000, agenda Item D-30, by deleting Recommendation 2.a from the Recommendation Section and any reference to consolidation in Applicant Requirements Section.

Respectfully Submitted,


Barry Cheung
Land Agent


APPROVED FOR SUBMITTAL:

D-12

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 9, 2005

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

04od-312

Oahu

Resubmittal - Amend Prior Board Action of August 24, 2001, under Agenda Item D-29, Issuance of 150 Leases for Private Residential Noncommercial Piers Pursuant to the Kaneohe Bay Piers Amnesty Program; Issuance of Direct Lease to YWCA for Private Noncommercial Pier Purposes, Kaneohe, Oahu, TMK (1) 4-5-104:44.

BACKGROUND:

This item was deferred from the Board meeting on November 18, 2005 due to the Board's inquiries regarding the amount of rent charged to non-profit organizations for dispositions within the past year.

PAST BOARD ACTIONS

A list of Board approvals for non-profit organizations (both new dispositions and existing leases) for the past year was requested by the Board to help determine an appropriate rent for the subject YWCA lease.

Prior to May 2005, the Board approved the continuation of the prevailing rent for each of General Leases No. 4544, 5101, 5102, and 5103, each of which is less than \$40 per month. See Exhibit A. As noted by the submittal for that group of leases, the approval requests were triggered by the leases' rental reopenings that were several years past due, in part due to the lack of a formal policy addressing rent charges for non-profit organizations.

On May 13, 2005, under item D-19, the Board approved a minimum rent policy for new dispositions (Policy). The purpose of this Policy was to establish consistency in the amount of rent charged for dispositions (whether by lease, easement, etc.) when the tenant is paying less than fair market value. For example, certain non-profits and certain governmental agencies were paying what was described as nominal rent or gratis. The minimum rent of \$40 per month or \$480 per annum was established to cover Staff's administrative costs, mainly for dispositions involving recurring rental payments, such as leases and certain easements.¹ After the adoption of this Policy in May

¹ Staff would point out that certain minor encroachments result in smaller easements (e.g., minor shoreline encroachments). If the fair market value for a small encroachment easement turns out be less than \$500.00, then the Board's policy sets the minimum rent at a flat \$500.00, in order to cover the minimum costs associated with staffs' time to administer and manage the easement or other disposition (as the minimum administrative cost). With respect

2005, there were several Board actions involving dispositions to non-profit organizations.

On June 9, 2005, the Board allowed GL 5358 to continue to pay its prevailing rent of \$1,445 per annum subject to verification that the lessee is providing services to underprivileged children. Staff notes that an appraisal determined the fair market rent for the ensuing rental reopening period as \$7,500 per annum. At the same meeting, the Board also allowed GL 5152 to continue to pay its prevailing rent of \$132 per annum. There is no record in the minutes relating to the rationale of the approval of this rent for GL 5152. However, staff discussed the case with staff handling GL 5152 and understands that the Board was aware of the maintenance responsibility of the historical site by this lessee. In October 2005, GL 5382 obtained a reduction in rent from \$4,000 to \$480 per annum. The dispositions for GL 5152 and GL 5382 involved rental reopenings.

Among the other new dispositions listed on Exhibit A, the Board approved an annual rent of \$500 for a revocable permit on June 9, 2005, item D-7 (i.e. after the Policy was adopted).

To date, the Board has not approved any one-time lease rental payment to any non-profit organization. All the existing leases cited above are paying an annual rent.

SUBJECT REQUEST

On August 24, 2001, under item D-29, the Board approved the issuance of a lease for private noncommercial pier purpose to the YWCA together with other pier owners participating in the Kaneohe Bay Piers Amnesty Program (Program).

Recently, staff sent an offer letter for the pier lease to YWCA requesting a one-time payment of \$75,500. In response, YWCA completed our Application and Qualification Questionnaire (see Exhibit C) requesting from the Board a more favorable consideration for the issuance of its pier lease. YWCA is the only non-profit organization registered under Section 501(c)(3) of the Internal Revenue Code in the list of applicants for the Program. According to YWCA, the pier is to be used in conjunction with a cultural learning center and "Kama'aina Kids" summer program for boating and other activities supported by the YWCA of Oahu. The participants of these activities are required to be YWCA members. The public will not have any access to the pier.

For the subject request, staff recognizes the operations of YWCA and its value to the community and has no objection to recommending to the Board issuance of a direct lease pursuant to 171-43.1, HRS. When the applicant is an eleemosynary organization, the Board may lease, at a nominal rent (in other words, "minimum rent" per the Minimum Rent

to the YWCA's situation, the pier that is encroaching on the submerged lands is approximately 8273 square feet, and the fair market value the pier lease is \$75,500. Therefore, pursuant to the Board's Minimum Rent Policy established on May 13, 2005, the minimum rent (or nominal rent) equates to \$480.00 per annum, or a one-time payment of \$10,610.00. See Exhibit D.

Policy established by the Board on May 13, 2005), by direct negotiation pursuant to 171-43.1, HRS. Generally, staff lists all rent options available to a non-profit organization in the submittal requesting a disposition. These options include the fair market rent derived by the methodology pursuant to the Program, a one-time lease rent payment adopting the minimum rent as set forth in the Policy (see Exhibit D), and a minimum annual rent as set forth in the Policy.

RECOMMENDATION:

That the Board amend its prior action of August 24, 2001, under Agenda Item D-29, to:

- A. Approve issuance of a direct lease to YWCA pursuant to 171-43.1, 171-53 (c), HRS, and Act 261, SLH 2000, for private noncommercial pier purposes, subject to the following:

1. The standard terms and conditions of the most current non-profit lease document form, as may be amended from time to time;
2. Review and approval by the Department of the Attorney General; and
3. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

- B. Determine that the lease rent to the YWCA shall be:

Fair market rent (one-time payment) for the time period July 13, 2001 to July 12, 2056, of \$75,500; or

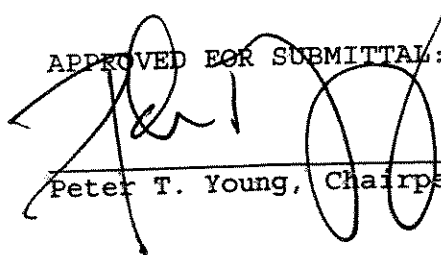
Nominal rent (one-time payment) for the time period July 13, 2001 to July 12, 2056, of \$10,610; or

Nominal rent (annual payment) for the time period July 13, 2001 to July 12, 2056, of \$480 per annum, with no rental reopening provision.

Respectfully Submitted,


Barry Cheung
Land Agent

APPROVED FOR SUBMITTAL:


Peter T. Young, Chairperson

List of Board Approvals for Disposition to Non-profit Organizations from October 2004 to Present

Board Date	Item No.	GL No.	Applicant/Lessee	Character of Use	Current annual rent	Approved annual rent	Notes
10/22/2004	D-1		Ao'ao O Na Loko I'a O Maui	Restoration of fishpond for educational, cultural, historical and recreational purposes.		Fair Market Rent	New disposition for lease; appraisal @ \$2,130 per annum accepted by the applicant
10/22/2004	D-8	GL 4544	Episcopal Church in Hawaii	Church and allied purposes	180	180	Rental Reopening
10/22/2004	D-8	GL 5101	Hawaii Conference of the United Church of Christ	Campsite purposes	132	132	Rental Reopening
10/22/2004	D-8	GL 5102	Hawaii United Methodist Union	Campsite purposes	132	132	Rental Reopening
10/22/2004	D-8	GL 5103	Hawaiian Association of Seventh-Day Adventists	Campsite purposes	132	132	Rental Reopening
4/22/2005	D-11		Waikiki Community Center	Multi-service community center		156	New disposition for lease
5/13/2005	D-19		The Board approved Minimum Rent Policy for New Dispositions				
6/9/2005	D-2	GL 5358	Kauai Independent Daycare Services Inc	Pre-school day care	1,445	1,445	Rental Reopening
6/9/2005	D-5	GL 5152	Hawaii Conference Foundation	Youth athletic, education and religious purposes	132	132	Rental Reopening
6/9/2005	D-7		Door of Faith Church and Bible School	Access, parking and church related purposes		500	New disposition for revocable permit; rent accepted by the applicant
10/28/2005	D-20	GL 5382	Waianae District Comprehensive Health and Hospital Board	Health care and medical facilities purposes	4,000	480	

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

May 13, 2005

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Statewide

Minimum Rent Policy for New Dispositions

BACKGROUND

Pursuant to discussion among staff, we feel there is a need to balance staff time and costs against the returns from Land Division dispositions. The State should receive a fair return on the land while maintaining its duty under the public land trust.

The current lowest rent for leases and revocable permits is \$156 per year or \$13 per month. Staff cannot locate any Board approval regarding the definition or the origin of the "minimum rent". Staff believes that in the past we just administratively adopted the term.

A consulting report by local real estate appraisal and consulting firm Medusky & Co. was completed in April 2004 which addressed the state's proposed formula for calculating one-time payments for term shoreline encroachment easements. The report recommended that for small encroachments where the rent payment, when calculated using the recommended formula is less than \$500, a minimum rent be charged of \$500. The \$500 amount was derived via other small easement considerations researched from the market. This fee was considered reasonable in part for inconvenience and to defray administrative costs. The Board has adopted the \$500 minimum rent for shoreline encroachments.

RESEARCH

Staff has conducted some research into overhead and administrative costs necessary to manage new dispositions and reopenings. Other landowners were surveyed such as Campbell Estate and Kamehameha Schools Bishop Estate. Campbell does not have a universal minimum rent but every year they set their rent based on the current conditions and evaluates all new deals based on that. Calls to Kamehameha Schools were not returned. Department of Transportation (DOT) and Department of Agriculture were also surveyed as to their policy regarding minimum rent. Only DOT charges a minimum rent of \$20 per month for rental of storage areas in the harbor areas.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON *mo*

May 13, 2005

ITEM D-19

EXHIBIT " B "

Dispositions including lease, easement, license and revocable permit involve rental payments on a recurring basis or lump sum. The proposed guideline as explained below will cover these disposition but not the fee conveyances, e.g. sale of remnant or reclaimed land.

Further, staff notes that land dispositions involve multiple offices, e.g. DLNR, DAGS, AG. Staff would point out that the minimum rent recommended below only covers the staff cost of DLNR as the other agencies are only involved at the application stage. Once the disposition is consummated, DLNR is the only agency that manages the disposition and incurs staff costs. While we want to recoup part of the staff cost, staff feels that the figure has to be realistic and affordable by our tenants.

Also, time consumed for different disposition could be varied. Staff discussed the time with other districts and feels that an 8-manhour period is appropriate as the basis of this analysis.

EVALUATION:

Eight hours at a rate of \$18.91 (starting hourly rate of a Land Agent IV) is \$151.28. However, after the initial year, staff time expended on a disposition, which is in compliance with the terms and conditions, would be reduced substantially. Therefore, staff recommends a 75% discount from the total staff costs to account for the ongoing staff time on managing the disposition. Staff recommends \$40 per month or \$480 per year ($\$151.28 \times 25\% = \37.82 , rounded to \$40 per month) as the minimum rent for all dispositions involving recurring rental payment.

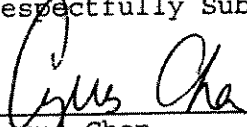
Staff feels the minimum one-time payment (\$500) adopted by the Board for shoreline encroachment could be used as a guideline for other term or perpetual easements as well. The report by Medusky based his findings on market data, which reviewed other minimum rent payments for a variety of other easements. The report concluded a minimum payment for small encroachment easements of \$500. Land Division has been recommending one-time payment for other types of easements (e.g. access, utility easements). Easement valuations are largely determined via independent appraisal. However, in the event the appraised value for the term or perpetual easement is below \$500, then Staff recommends a \$500 charge to cover administrative overhead. Staff feels this amount should be set as a minimum for all dispositions involving one-time payment.

RECOMMENDATION

That the Board approves the above policy by requiring:

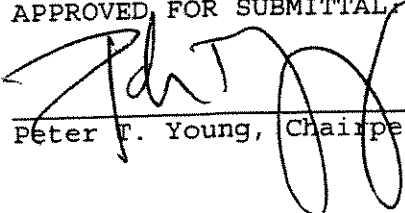
- A. All new dispositions by Land Division shall be subject to a minimum rent of \$40 per month, \$480 per year or \$500 (one-time payment) depending on the payment term.
- B. Staff shall bring any cases that require deviation from the above policy to the Board for approval.

Respectfully Submitted,



Cyrus Chen
Appraisal Manager

APPROVED FOR SUBMITTAL



Peter T. Young, Chairperson

APPLICATION AND QUALIFICATION QUESTIONNAIRE
(Non-Profit)

Write answers in the spaces provided. Attach additional sheets as necessary, clearly indicating the applicable section number.

Part I: General Information

1. **Applicant's legal name:** Young Women's Christian Association of O'ahu
2. **Applicant's full mailing address:**
1040 Richards Street
Honolulu, HI 96813
3. **Name of contact person:** Cheryl Ka'uhane Lupenui, President/CEO
Contact person Phone No.: 538-7061 ext 222 **Fax No.:** 521-8416
4. **Applicant is interested in the following parcel:**
Tax Map Key No.: 1-4-5-104:450 **Location:** 45-035 Kaneohe Bay Drive,
Kaneohe, Hawaii
- If Applicant is current lessee:** **General Lease No.:** N/A
5. **When was Applicant incorporated?** Organized in 1903
6. **Attach the following:**
 - A. Articles of Incorporation
 - B. Bylaws
 - C. List of the non-profit agency's Board of Directors
 - D. IRS 501(c)(3) or (c)(1) status determination
 - E. Tax clearances from both the Internal Revenue Service and State of Hawaii
 - F. Audited financial statements for the last three years. If not audited, explain why.
If Applicant is a new start-up, attach projected capital and operating budgets.
 - G. Any program material which describes eligibility requirements or other requirements to receive services

Part II: Qualification

7. **Is Applicant registered to do business in Hawaii:** Yes
8. **Has Applicant received tax exempt status from the Internal Revenue Service?** Yes
9. **Is Applicant licensed or accredited in accordance with federal, State or county statutes, rules, ordinances, to conduct the proposed activities?** No

List all such licenses and accreditations required: Not required by law

10. **Is Applicant in default or otherwise not in good standing with any State department (e.g. POS agency, DCCA, DLNR, etc.)?** No

If yes, explain:

11. Has Applicant had a State of Hawaii lease, permit, license, easement or sale in fee cancelled within the last five years? If yes, list: No

<u>Doc. No.</u>	<u>Type of Agreement</u>	<u>Term of Agreement</u>
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12. Does Applicant have any policies which discriminate against anyone on the basis of race, creed, color, national origin, sex or physical handicap? No

If yes, explain:

13. Has Applicant received funding from a federal, State, or county government agency, the Aloha United Way, and/or a major private foundation within the last three years? Please list all such contracts below: Yes

<u>Agency</u>	<u>Contract Term</u>	<u>Contract</u>
<u>Amount</u>		
Harry and Jeanette Weinburg Found.	2004	\$1,000,000
SOH-Grant in Aid	2004/2005	\$600,000
CDBG	2004/2005	\$250,000
Aloha United Way	Annual	\$275,000
Castle Foundation	2004	\$157,000

14. If Applicant has not received funding from a federal, State or county government agency, the Aloha United Way and/or a major private foundation during the past three years, describe Applicant's qualifications to effectively perform the proposed services, including but not limited to, grants or subsidies received from non-major, private funders and/or staff or Board members who possess significant experience in Applicant's service field.

N/A

Part III: Program Activities and Persons to be Served

15. What activities will be conducted on the premises to be leased?

Area to be leased is in the same location that a pier has been located since 1929 and is to be used as a pier for docking of small boats.

16. What are the specific objectives of these activities?

The pier is to be used in conjunction with the Cultural Learning Center and Kama'aina Kids summer program for boating and other activities supported by the YWCA of O'ahu.

17. Describe the community need for and the public benefit derived from these activities.

The former pier was in this location for over 50 years until the planks were reclaimed by the sea in the 1980s. Lack of funding at the YWCA prevented the rebuilding of the pier

18. Describe the targeted population for these activities by: 1) age group, 2) gender, 3) ethnic background, 4) income level, 5) geographic location of residence, 6) special needs/disability, and 7) other applicable characteristic(s).

The target age group for activities at Kokokahi is 12 and older years of age, with a focus on women, individuals of diverse ethnic backgrounds, and low-income families, from the Island of Oahu, without special needs as described herein.

19. Describe all eligibility requirements of clients to participate in the activities, e.g. age, income level, ethnic background, income level, disability, etc.

Participants are required to be YWCA members.

**20. Do you require membership to participate in these activities?
If yes, list the requirements of becoming and remaining a member:**

Yes

Payment of an annual membership fee of \$35.00

21. How many unduplicated persons will engage in the activities annually?

Activity

Persons Per Year

Undetermined-social, community, etc.

22. Is State funding made available for the activities to be conducted on the leased premises?

No

If yes, by which State agency:

N/A

23. List all activities to be conducted on the leased premises which require payment of excise taxes, e.g. subleasing, sale of products or services. Include an estimate of annual gross revenues from each activity.

None

Development of the Land

24. Describe the proposed site development plan for the property, indicating the location and size of buildings, parking areas, landscaped areas and related uses. Attach sketch of plan if available.

The YWCA Kokokahi pier was originally constructed in 1929. The YWCA proposes to restore the pier back to original condition and no expansion of the pier will be constructed. Restoration of the pier will include repairs to the piles located on state-owned, submerged land. A lease of the submerged lands is needed to start restoration of the pier. The YWCA intends to use the pier for recreational activities. See attached Metes and Bounds map for location of the pier.

25. What improvements to the land do you intend to make and at what cost?

Improvements are to renovate the pier. This would include replacing the deck planks, deck framing, and repairing cracks or spalls of the existing pilings. Repairs to the piles entails wrapping them with spiral reinforcing, followed by encasement with concrete that extends at least 12 inches into the floor of the Bay. An assessment of coral communities in the vicinity of the Kokokahi YWCA pier was conducted in June 2004 by Marine Research Consultants. See attached report. The report concluded coral do not occur on the existing cement pilings. Coral does occur in the immediate vicinity of the existing concrete pilings but does not extend beyond a small portion of the seaward end of the pier. The report recommended mediation action to ensure no net loss of coral within the vicinity of the pier.

26. How will the improvements be funded?

Community fundraising campaign in addition to grant proposals to local foundations

27. Describe all environmental, land use and other permitting requirements which must be met to develop the land as proposed.

Renovation of the pier may trigger the following approvals and permits. Landward from the certified shoreline, a Special Management Area (SMA) Use Permit and Shoreline Setback Variance or Minor Shoreline Structure Permit are needed from the City and County of Honolulu (CCH) and a

Coastal Zone Management (CZM) Certificate of Consistency is need from the State. Seaward from the certified shoreline, a Conservation District Use Permit, Shoreline Certification, and a long-term lease for use of state-owned lands, all issued from the State of Hawaii. Also needed is a Section 10 permit (Rivers and Harbors Act of 1899) or Letter of Permission from the U.S. Army Corps of Engineers for construction in navigable water of the United States is needed from the Federal Government.

28. Will you be subleasing any portion of the property? If yes, describe the sublease uses:

The YWCA does not intend to sublease any portion of the property. The submerged land is to be used for the restoration of the Kokokahi pier at an estimated cost of about \$420,000

Part V: Notarized Certification

I/We hereby certify that the statements and information contained in this Application and Questionnaire, including all attachments, are true and accurate to the best of my/our knowledge and understand that if any statements are shown to be false or misrepresented, I/we may be disqualified from receiving a lease or my/our lease may be canceled.

Young Women's Christian Association of Oahu

By: 

Cheryl Kauhane Lupenui

President and CEO

Date: 10/21/2005

Subscribed and sworn to before me this
21st day of October, 2005


Notary Public JODY L. THOMAS

City & County of: Honolulu

State of: Hawaii

My commission expires: 2-17-2006

Reconsideration of Rent - Issuance of Lease for Private Noncommercial Pier Purposes to YWCA
Kaneohe, Oahu, TMK (1) 4-5-104:44 seaward

	Option A	Option B
	Kaneohe Bay Piers Amnesty Program	Adopting the minimum annual rent from the Minimum Rent Policy for New Disposition
2000 Tax Assessment	\$722,900)
Divided by land area (\$ per sf)	\$20.64)
Submerged land adjustment	x 50%)
Submerged land value (\$ per sf)	\$10.32) Not applicable
Pier area (sf)	8,273)
Pier submerged land value	\$85,377.36)
Multiplied by 4% rate of return	x 4%)
Annual rent (rounded)	\$3,415.09	\$480 ⁽¹⁾
Present value (factor 55 yrs @4%)	x 22.1086	x 22.1086
One-time lump sum payment	\$75,502.86	\$10,612.13
Rounded	\$75,500	\$10,610

(1) \$480 is the minimum annual rent as set forth in the Minimum Rent Policy for New Disposition

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

December 9, 2005

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

PSF No.: 02od-400

OAHU

Amend Prior Board Action of December 13, 2002, under Item D-7, Grant of a 55-year Non-Exclusive Easement for House Decks Overhang and Seawall Extension to Thomas Robertson; Kaneohe, Koolaulupoko, Oahu, TMK (1) 4-7-19:20 seaward

BACKGROUND:

The applicant is one of the property owners recorded in our Kaneohe Bay Piers Amnesty Program database. Subsequently, the applicant informed the staff that there is no pier abutting the property. However, by the map prepared by his land surveyor, portions of the house deck overhang and seawall extension were found encroaching onto State lands.

On December 13, 2002, under agenda item D-7, the Board authorized the issuance of a term easement to Thomas Robertson for house decks overhang and seawall extension purposes.

On September 12, 2003, under agenda item D-7, the Board amended its prior action by authorizing the acceptance of a deposit (\$6,655) from the applicant for the estimated appraised value for Easements A, B and C (\$6,600), documentation fee (\$30), and map fee (\$25).

Upon receiving the easement document for execution, the applicant raised concerns regarding the appraisal and some of the standard conditions of the easement. The appraised value for Easements A, B and C is \$4,180. The applicant has been reimbursed the difference (i.e. \$6,655 - \$4,180 - \$55). A copy of his letter is attached as Exhibit A. The issues and staff's responses are summarized in the following paragraphs.

1. As noted from the survey map attached as Exhibit B, the subject easement includes Easement A (CRM wall and filled land, 48 sq. ft.), Easement B (concrete overhang, 13 sq. ft.) and Easement C (concrete deck, 137 sq. ft.). The applicant has now stated that he intends to remove Easements A and B because their conditions are deteriorating. Photos showing Easements A & C are attached as Exhibit C.

Response: Staff has no objection to the request and recommends the Board amend its prior action by deleting Easements A and B from the easement area. However, the applicant needs to obtain permission, if appropriate, from other agencies for the removal of the encroachments.

2. The applicant believes that for Easement C, the concrete overhang with headroom of about seven feet below the deck, the disutility factor should be adjusted in applicant's favor.

Response: Staff notes that the appraisal for Easement C is not different from other typical shoreline encroachments, e.g. seawalls, i.e. using a 90% disutility factor. Pursuant to the methodology approved by the Board on April 23, 2004 relating to the shoreline encroachment easement, the staff appraiser, subject to the approval of the Chairperson, is authorized to adjust the disutility factor. Staff has discussed the issue with the staff appraiser and he is agreeable to a downward adjustment of the disutility factor. A copy of the revised appraisal is attached as Exhibit D.

3. The applicant has written to us about his concerns regarding other standard conditions in the document.

Response: Staff requested the Department of the Attorney General (AG) to review the applicant's concerns. After review, the AG is only recommending (and staff agrees) the easement running with the land. See Exhibit E.

Staff does not recommend any further changes to the standard form easement document that has already been approved by the AG. Alternatively, the applicant may remove all encroachments and the Department would refund the appraised value for Easements A, B and C (\$4,180), map fee (\$30), and documentation fee (\$25) paid by the applicant.


RECOMMENDATION:

That the Board amend its prior action dated December 13, 2002, agenda item D-7 by:

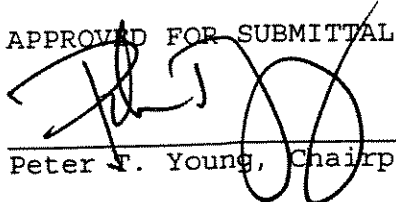
1. Reducing the easement area to cover only Easement C;
2. Approving the appraisal on Exhibit D; and
3. Adding the following provision to the easement document:

"The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key (1) 4-7-19:20, provided that when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document."

Respectfully Submitted,


Barry Cheung
Land Agent

APPROVED FOR SUBMITTAL:


Peter F. Young, Chairperson

Thomas F. Robertson
47-035 Kamehameha Highway
Kaneohe, HI 96744

RECEIVED
LAND DIVISION

2005 NOV -2 A 11: 06

November 1, 2005

Peter T. Young, Chairperson
Department of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

RE: Easement No. S-5710
Kaneohe Bay Piers Amnesty Program
Owner: Thomas F. Robertson
47-035 Kamehameha Highway, Kaneohe
TMK 4-17-19-20

Dear Mr. Young:

I would like to present several matters for the Board's consideration. Thank you in advance for considering these matters.

1. WITHDRAWAL OF REQUEST FOR EASEMENTS A AND B.

The Board has approved easements concerning 3 separate encroachments on my property. Final documents have not been executed, however. Easement A is a rectangular piece of land (See attachment 1). The sea wall supporting this has substantially fallen down (See attachment 2) and I do not wish at this time to purchase an easement. Thus I will remove the encroachment.

Easement B is a small overhang that is supported by a wall perpendicular to the sea wall. (See attachment 3) In that this perpendicular wall is improperly on my neighbor's property, I need to remove it. Thus I would also like not to purchase an easement covered by easement B and will remove this encroachment.

I desire to purchase Easement C. It is a continuation of the housing structure and is cantilevered. It's removal or modification would cause severe problems.

EXHIBIT "A"

2. RECONSIDERATION OF THE TERM EASEMENT CALCULATION FOR EASEMENT C.

Easement C involves a cantilevered deck that overhangs the ocean. (See attachment 4) In determining the cost of the easement, a disutility factor of 90 percent was used. The portion overhanging and encroaching on to state land is 137 square feet. This deck is 7 feet above the ocean floor and thus allows easy passage underneath and complete use by others of the state land. (See attachment 5). The Board in its approval of the easement for the subject property stated that the "[Coastal Land Program staff] noted that no Conservation District Use Permit nor fine is required because these encroachments do not meet the definitions of a land use within the Conservation District as they only occupy air space." (See attachment 6) According to the Board's Methodology approved on April 23, 2004, the staff appraiser is to make adjustments to the disutility factor based on the encroachment (See attachment 7). As the report explained "(d)isutility factors are typically low for non-obtrusive easements such as a non-exclusive, underground pipeline easement running along a property boundary and high for exclusive easements such as an electrical substation." This easement, in occupying only a small amount of airspace, is very unobtrusive and should not be given the same disutility factor as a structure completely occupying the same space. The public is free to use the area underneath the overhang (and is even protected from the frequent Kaneohe rains). I request that the Board reconsider the calculation in its use of a 90 percent disutility factor.

See Attachment 4.5

See Attachment 7.5

3. SUITABILITY OF THE STANDARD TERM EASEMENT DOCUMENT

I am a recent admittee to the Hawaii bar after practicing 19 years in Massachusetts, primarily as a property lawyer. I reviewed the easement and requested that several provisions be reconsidered. (See attachment 8) Most of my concerns were not addressed. (See attachment 9) The easement seems to have been prepared for other situations and simply altered slightly for use in this program. Many provisions don't apply and are neither in the state's nor my interest. Following are 3 of the several problems:

Example 1: Clause 13 requires me to get permission of the Chairperson before I mortgage the easement and any mortgage without approval shall be null and void. (See attachment 10) In that the easement runs with the land it becomes part of the my property and necessitates obtaining and recording said approval before recording a mortgage covering the property. This will require the expense of obtaining and recording approvals for me and many others. Why does the state want me to get permission before I refinance a mortgage or obtain an equity line?

Example 2: Clause 5 similarly prohibits the transfer or mortgage of this easement without the prior written consent of the grantor. (See attachment 11) In that the easement runs with the land and the conveyance of the land conveys the easement, this would similarly require the recording of consent before any sale or mortgage of the property. Will this be readily available? What is the state's interest in this that would justify the expense and inconvenience of both me and the state?

Example 3. Clause 9 renders the easement automatically forfeited (NO ACTION BY THE STATE IS REQUIRED) "in the event of non-use or abandonment of the easement area or any portion thereof, for a consecutive period of one year." (See also attachment 11) What is use- is it enough that the deck is there or do I need to actually use it physically? How do I prove to a subsequent purchaser that I used all of the easement continuously? How do I do this as of record title? If a small portion breaks off am I not using a "portion thereof" and thus the entire easement terminates automatically? Why does the state want this provision in the first place?

I have many other concerns with the lease. I would request that the Board allow me to sit down with someone to consider my concerns. I would be more than happy to assist whomever to help draft a document that meets all of the state's needs and concerns but at the same time gives the grantor's what is promised- an easement that is not burdened by unnecessary problems and expenses.

4. NECESSITY FOR INSURANCE

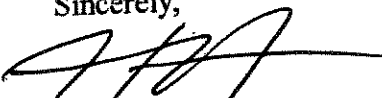
Clause 11 of the easement requires me to obtain insurance naming the State of Hawaii as an additional insured. My homeowners insurance is \$548 but my agent has told me that this additional rider will cost me \$900 per year. (Clarence Tanaka who can be reached at 792-2004 for confirmation). This was to insure the additional 198 square feet involved.

It is well settled law in Hawaii and elsewhere that control over an easement and not ownership of the property subjects one to liability where an easement is involved. See *Levy v. Kimball*, 50 Hawaii 497, 499, 443 P.2d 142, 144 (1968) There the court said "it is a well established rule that an owner of an easement has the right and the duty to keep it in repair. The owner of the easement is liable in damages for injuries caused by failure to keep the easement in repair" (See attachment 12). Recently the Hawaii Appeals Court reaffirmed this position stating that "Hawaii follows the general rule that 'it is the control and not the ownership [of premises] which determines liability'" *Wemple Ex Rel Dang v. Dahman*, 102 Hawaii 27 (App 2002) (See attachment 13) The courts only apply liability where there is control (See *Wemple* at 55) and I would be in complete control of this easement, not the state per the agreement. (Clause 6) Given also my agreement to indemnify the state (Clause 1) there seems to be no need for insurance.

Given the cost involved I request the State to remove the need for insurance.

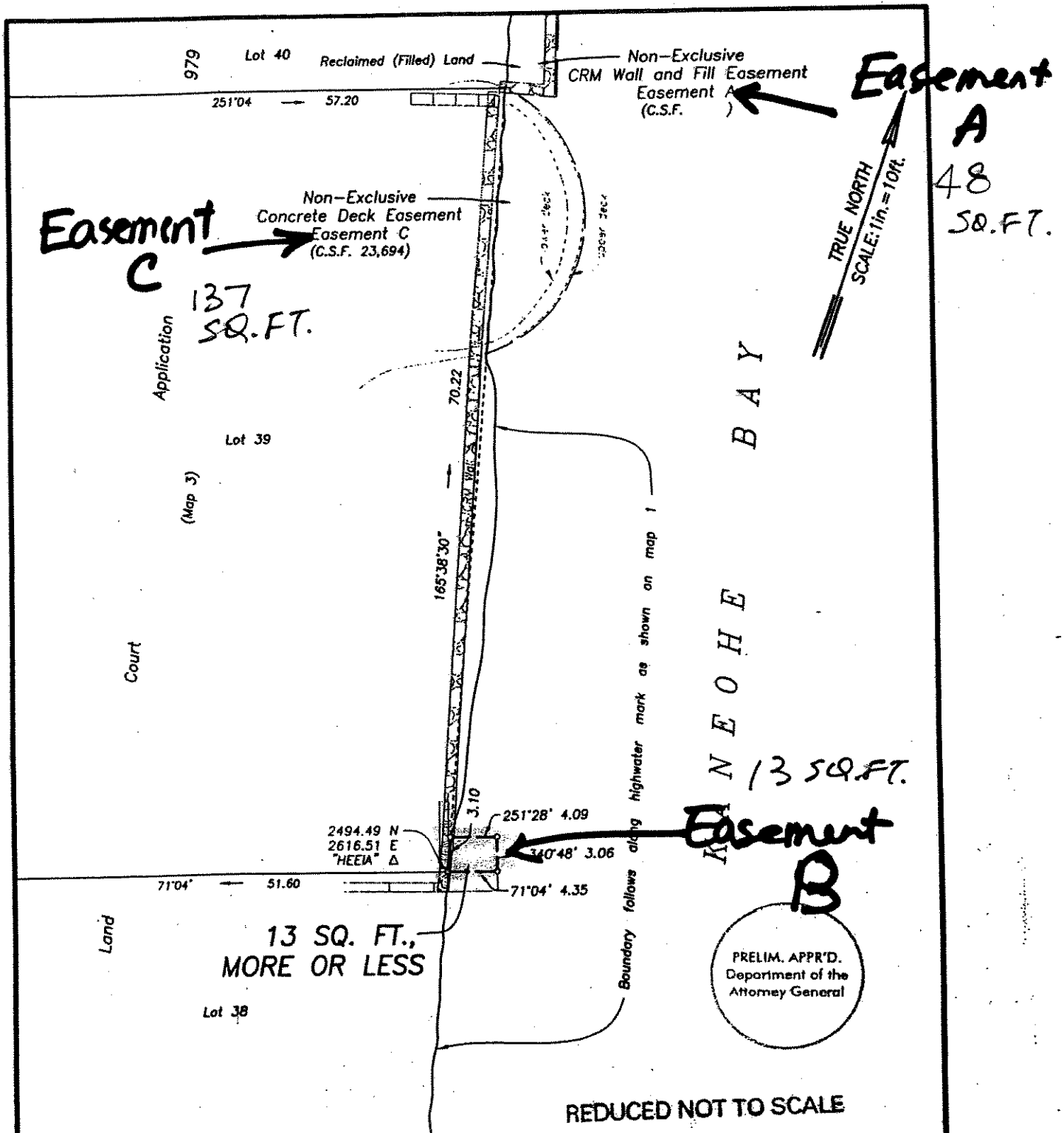
Again, thank you for your consideration of these matters.

Sincerely,



Thomas Robertson

Attachment "3"



NON-EXCLUSIVE CONCRETE OVERHANG EASEMENT
EASEMENT B

Fronting Lot 39 of Land Court Application 979

Kahaluu, Koolaupoko, Oahu, Hawaii

JOB 0-274(03)

C. BK.

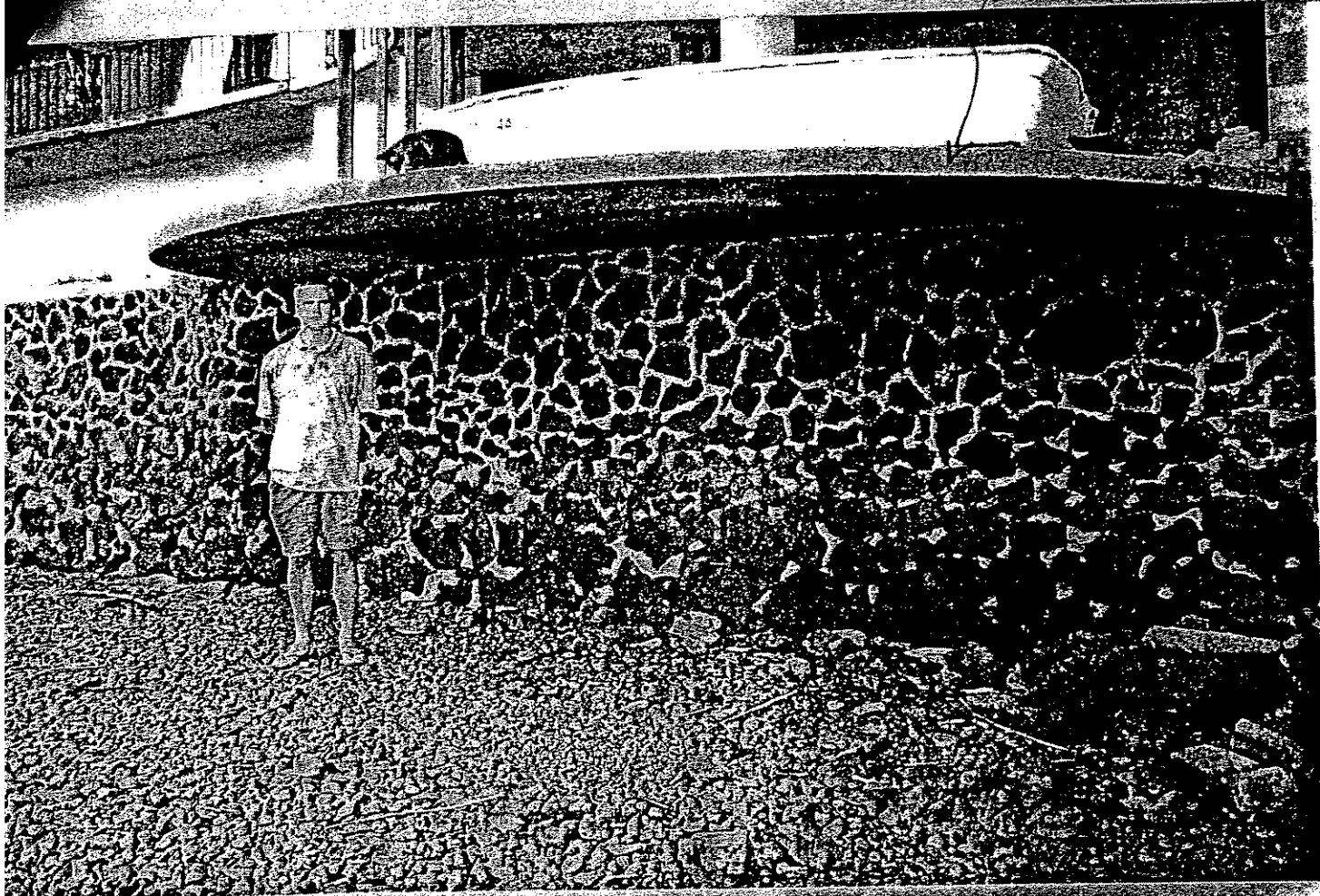
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EXHIBIT "D"

EXHIBIT "B"

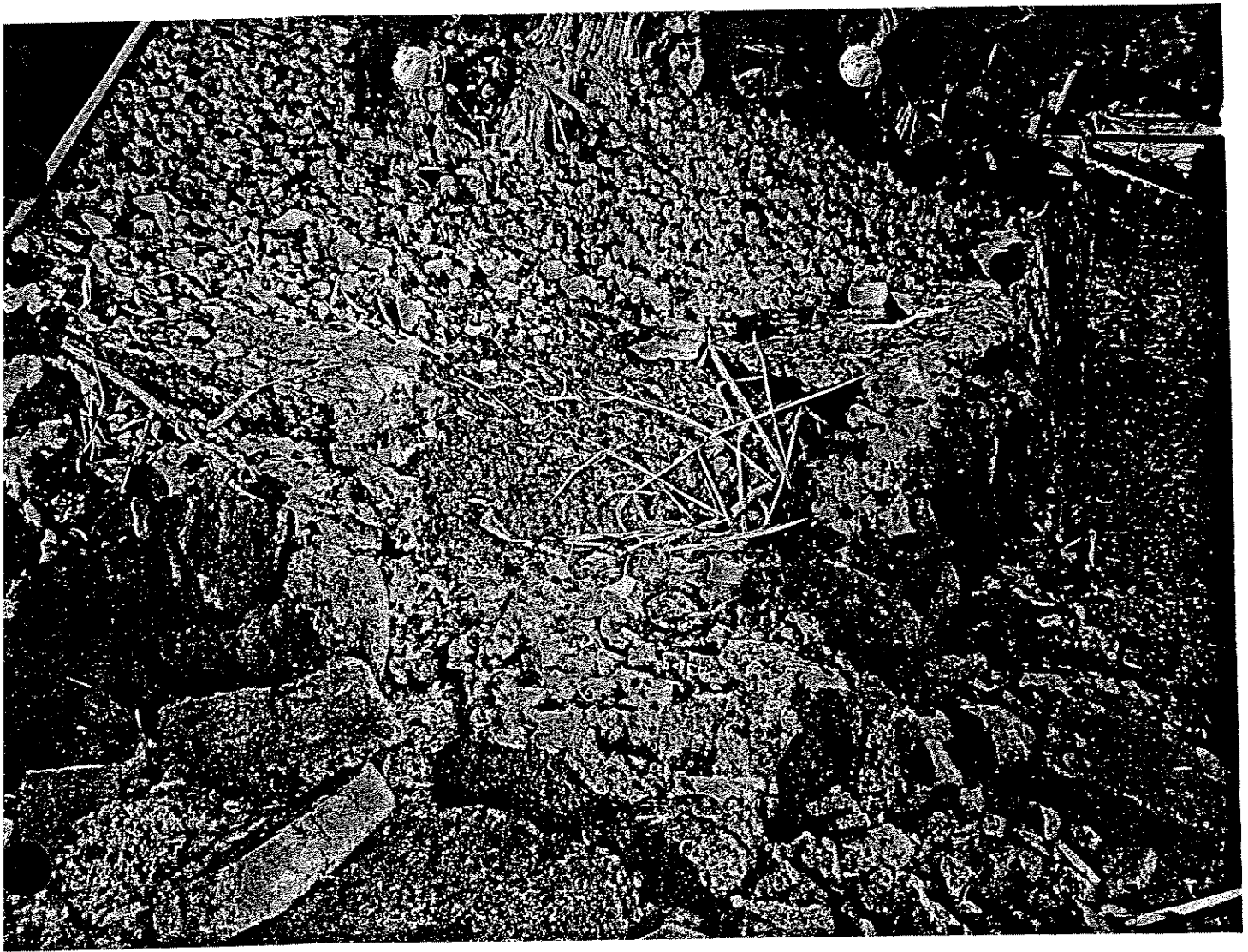
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EASEMENT "C"



EASEMENT

"C"



Attachment "2"

EASEMENT A

**TABLE OF CALCULATIONS
TERM EASEMENT CALCULATION**

PSF No.: 02OD-400	Concrete overhang, & deck
Applicant:	Thomas Robertson
TMK:	(1) 4-7-19, Parcel 20
Fast Land Area (sq. ft.):	4,384
Easement Area (sq. ft.):	137
Date of Value:	December 13, 2002

Lump Sum Payment Calculation

Appraised Fast Land Value*	\$172,000
Per Sq. Ft.	\$39.23
Disutility Factor	30%
Adjusted Land Value	\$11.77
Easement Area	137
Easement Land Value	\$1,612.49
Multiplied By 4% Rate of Return	4%
Annual Rent (Rounded)	\$64
<u>Present Value Calculation</u>	
Factor for 55 Years at 7%	14.9157
Total (Rounded)	\$950

* Fast land appraised by Yamaguchi & Yamaguchi, Inc.

V-27

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

January 14, 2005

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

030D-274

OAHU

Amend Prior Board Action of July 30, 2004 under Agenda Item D-16, for Grant of a 55-year Non-exclusive Easement for Seawall Purposes to the Lily Yee Wong Revocable Living Trust, Kaneohe, Oahu TMK (1) 4-9-009:019 seaward and Prior Board Actions for Grant of Easements for Shoreline Encroachments

On July 30, 2004 under Agenda Item D-16, the Board approved the issuance of a term non-exclusive easement to the Lily Yee Wong Revocable Living Trust for seawall purposes.

The seawall easement is meant to run with the adjacent land. The recommendation section normally cites the condition that uses the term inured but this paragraph was inadvertently omitted. This condition applies to this seawall and all other seawall easements we are processing at this time.

RECOMMENDATION: That the Board:

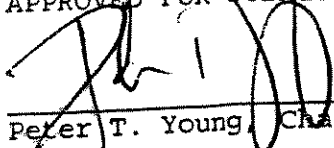
1. Amend its action of July 30, 2004 under Agenda Item D-16 to include the "inured" condition which reads: "The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: 4-9-009:019, provided that when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document".
2. Amend all prior approvals of term easements for shoreline encroachments to add the "inured" condition if not already included in the individual submittals.

Respectfully Submitted,



Al Jodar
Land Agent

APPROVED FOR SUBMITTAL:



Peter T. Young, Chairperson

EXHIBIT "E"

D-27